Author: S Heleba

MOOTNESS AND THE APPROACH TO COSTS AWARDS IN CONSTITUTIONAL LITIGATION: A REVIEW OF *CHRISTIAN ROBERTS v MINISTER OF SOCIAL DEVELOPMENT* CASE NO 32838/05 (2010) (TPD)

ISSN 1727-3781

2012 VOLUME 15 No 5

http://dx.doi.org/10.4314/pelj.v15i5.16

MOOTNESS AND THE APPROACH TO COSTS AWARDS IN CONSTITUTIONAL LITIGATION: A REVIEW OF *CHRISTIAN ROBERTS v MINISTER OF SOCIAL DEVELOPMENT* CASE NO 32838/05 (2010) (TPD)

S Heleba*

1 Introduction

After nearly three years of waiting, the North Gauteng High Court (then the Pretoria High Court) finally handed down judgment in March 2010 in the case of *Christian Roberts v Minister of Social Development*.[1] The case was a constitutional challenge to section 10 of the *Social Assistance Act* 13 of 2004 and the relevant Regulations, which set the age for accessing an old age grant at 60 for women and 65 for men. After the hearing the High Court had reserved judgment. Pending judgment the government had amended the legislation in dispute so that the pensionable age for the purposes of accessing a social grant would be equalised over time. Despite the change in legislation, the High Court found against the applicants and punished them with a costs order.

Until such time as it is appealed against and overturned, as it stands this decision presents a grave concern to some constitutional law principles relating to mootness and the approach to costs in constitutional litigation between the State and private litigants. Particularly, the decision threatens the hitherto special role played by public interest litigants in vindicating constitutional rights ranging from access to housing and land, to the rights of the child, gay men and lesbian women and freedom of expression, among others. This contribution tackles two issues arising from the judgment of the High Court. The first issue is that of 'mootness', which arises from the government's decision to amend the impugned legislation complained of by the

* Siyambonga Heleba. LLB (UWC), LLM (UU), Adv Cert (AAU) Dip (UJ). Lecturer, Faculty of Law, University of Johannesburg. Email: scheleba@uj.ac.za. This case note is based on a the paper presented at the Law Teachers Conference on 18 January 2011, at the University of Stellenbosch. The author is indebted to the two anonymous referees for their valuable comments on an earlier draft of this note. All mistakes are mine.

1 *Christian Roberts v Minister of Social Development* Unreported Case No 32838/05 (2010) (TPD). The author attended the two-day hearing of the case in September 2007, in his capacity as a researcher at the Community Law Centre, of the University of the Western Cape, and an *amicus* in the case.

applicant, which effectively knocked the wind out of the applicants' constitutional challenge. The second issue is the decision by the judge to award an adverse costs order against the applicants and the *amici*. Guided by how the courts in South Africa and abroad have dealt with similar matters in the past, in this contribution the author aims to demonstrate the implications of this decision for constitutional law generally and for public interest litigation in particular.

Quite apart from the two issues referred to above as precipitating the present discussion, there is one more reason why a review of this judgment is necessary. A recent discussion with the attorney for the *amici* on the case has revealed that the prohibitively high costs of taking the matter on appeal to the full bench have discouraged the parties from pursuing this avenue.[2] The losing parties are also hoping that the government will come to its senses and abandon the costs awarded in its favour. This unfortunately has not happened until now. Thus the single judge's erroneous decision remains law for the time being, although it is wrong law.

The discussion commences with a brief factual background to the case, followed by a discussion of the important constitutional principle of the doctrine of mootness. This is followed by an outline of the principles relating to costs orders in matters raising an important constitutional issue, and in matters brought in the public interest. The review concludes that the court *a quo* erred in deciding the merits of the case, and that even when it had decided to pronounce on the merits – as it did – it nonetheless should not have punished the applicants and the *amici* with the costs thereof. The correct approach was to order that each party pay his or her own costs.

2 Factual background

The pertinent facts are that four male applicants, above the age of 60 but below 65 at the time of the application, mounted a constitutional challenge to section 10 of the *Social Assistance Act* 13 of 2004 and the relevant Regulations, which set the age for accessing old age grants at 60 for women and 65 for men. They attacked the differentiation on the basis that it violates the equality clause (section 9(3)) and the

2 A discussion with Moray Hawthorn of Webber Wentzel Attorneys, on 24 January 2012.

right of access to social assistance (section 27(1)(c)) guaranteed by the *Constitution*. For its part, the government argued that the differentiation is aimed at addressing inequities faced by women generally, and by African women in particular. It was argued for the government that African women faced race, class and social discrimination during apartheid. However, subsequent to the hearing the government brought the discrimination to an end by amending the impugned legislation so that the differentiation would be phased out over a three-year period, so that men would access social old age grants from the age of 63 by April 2008; from 61 years by April 2009; and ultimately achieve equality (at 60) by April 2010. Despite this change in the legal position, the High Court found against the applicants and upheld the contentions justifying the retention of the differentiating scheme at the time the case was heard. In effect the High Court order sought to retain a dead legislative scheme.

3 The mootness doctrine

The legal doctrine confronting the Court – but ignored by the Court – in *Christian Roberts* is known as 'mootness'. The doctrine is well developed in American constitutional law jurisprudence. Accordingly, a case is a moot one if it[3]

> …seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy.

Furthermore, a case will be moot[4]

> [i]f the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, and the court is without power to grant a decision.

Barron and Dienes put it succinctly when they observe that a "[a] case or controversy requires present flesh and blood dispute that the courts can resolve".[5] Loots, a South

3 Diamond 1946 *U Pa L Rev* 125. See also Brilmayer 1979 *Harv L Rev* 297; Fountaine 1998 *Am U L Rev* 1053; Peter and John *Federal Courts.* For a recent critical discussion of the mootness doctrine see Hall 2008 works.bepress.com.

4 Diamond 1946 *U Pa L Rev* 125.

5 Barron and Dienes (eds) *Constitutional Law* 44.

African constitutional commentator, endorses these sentiments and points out that a case[6]

> ….is moot and therefore not justiciable if it no longer presents an existing or live controversy or the prejudice, or threat of prejudice, to the plaintiff no longer exists."

It is without a doubt that the case of *Christian Roberts* perfectly fits the description of a moot case as a result of the government's amending the impugned legislative provisions and the accompanying regulations. The consequence of the Court's giving judgment in *Christian Roberts* is that any order it makes on the merits would have no practical effect on the applicants or the public at large, and would serve no purpose but an academic one.[7]

4 The mootness doctrine in South African constitutional law

4.1 General principles

Loots observes that the mootness doctrine – as we know it – did not find application in South African law before the advent of the Interim Constitution of 1993.[8] However, she concedes that as early 1963 our courts have declined to decide cases where the issues had no more than academic significance and as such would not have a binding effect on the parties.[9] Since 1994 there have been a number of cases in which the Constitutional Court has applied the doctrine.

In *JT Publishing (Pty) Ltd v Minister of Safety and Security*,[10] the Court, per Didcott J, stated that courts are governed by a judicial policy which vests in them a discretion, and that it is[11]

6 Loots "Standing, Ripeness and Mootness" 18.
7 It would, however, be useful – as it was indeed – in awarding costs in the matter. The problems with the manner in which the Court dealt with the issue of costs in the matter are highlighted in s 6 of this case note.
8 Loots "Standing, Ripeness and Mootness" 20.
9 Loots "Standing, Ripeness and Mootness" 20, citing the case of *Masuku v State President* 1994 4 SA 374 (T) 380I which refers to *Ex parte Nell* 1963 1 SA 754 (A) 760B-C.
10 *JT Publishing (Pty) Ltd v Minister of Safety and Security* 1996 12 BCLR 1599 (CC).
11 *JT Publishing (Pty) Ltd v Minister of Safety and Security* 1996 12 BCLR 1599 (CC) para 15.

> a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones.

In that case, the legislation complained of by the applicants had been replaced by new legislation by the time the Court delivered judgment. The Court declined to make a decision on the merits of the case on the basis – as the Court put it, that[12]

> [T]here can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but a historic one, than those on which our ruling is wanted have now become. The repeal of the Publications Act has disposed altogether of the questions pertaining to that. And any aspect of the one about the Indecent or Obscene Photographic Matter Act which our previous decision on it did not answer fully has been foreclosed by its repeal in turn. I therefore conclude that we should decline at this stage to grant a declaratory order on either topic.

In a persuasive dissenting opinion in *President of the Republic of South Africa v Hugo*,[13] Didcott J expressed the view that the case had become moot as[14]

> …the respondent in this matter could derive no apparent benefit or advantage from the declaration which he sought and obtained from the lower court. The issue raised by him had also become by then 'wholly academic ... exciting no interest but an historical one'.

The respondent in the case, an imprisoned father of a twelve year old, had mounted a constitutional challenge to the exercise by the President of powers in terms of a presidential pardon decree. In terms of the decree the President was to grant an early release from prison to certain mothers of children younger than twelve years old. The respondent argued that the decree discriminated against him and his son on the grounds of sex and gender, in violation of his right to equality contained in section 8 of the Interim Constitution. Thus he sought an order from the Constitutional Court confirming the order of invalidity granted by the High Court in his favour. According to Didcott J the respondent stood to benefit nothing from the order as, in the first place, he would not secure an early release from prison because the child was not younger than twelve years old when the case was lodged in the High Court and had reached the age of thirteen when the confirmation proceedings commenced. Secondly, deciding the case would result in no public benefit – and was

12 *JT Publishing (Pty) Ltd v Minister of Safety and Security* 1996 12 BCLR 1599 (CC) para 17.
13 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC).
14 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 57.

therefore not required for the future guidance of anybody as the decree was a unique measure, taken to celebrate the inauguration of our first democratically elected President.[15] Thirdly, said the Court, [16]

> [i]ts repetition on any similarly auspicious occasion which may arise some day seems improbable, in the same form at any rate. It is certainly less likely than censorship to be repeated.

In *S v Dlamini* the Constitutional Court held that mootness may prevent the Court from entertaining a request for a confirmation order where there remains no triable issue.[17] In *President of the Ordinary Court Martial v Freedom of Expression Institute* the Court stated that[18]

> [m]ootness is particularly likely to be a bar to relief where the constitutional issue is not merely moot as between the parties but is also moot relative to society at large, and no considerations of compelling public interest require the court to reach a conclusion.

In *S v Manamela* the Constitutional Court stated that it will decide a case despite the argument of mootness if to do so would be in the public interest.[19]

The Constitutional Court did indeed entertain a moot matter in *MEC for Education, KwaZulu-Natal v Pillay*.[20] In this case a school learner had returned to school from a holiday with a nose stud. The school decided the learner would not be allowed to wear the stud. The respondent, the learner's mother, took the school and the MEC for Education in KwaZulu-Natal to the Equality Court, alleging that they had unfairly discriminated against her child and had violated the child's religious and cultural rights. The Equality Court found that the school's decision to ban the wearing of the stud did not unfairly discriminate against the learner. The mother appealed against this finding to the High Court. The High Court upheld the appeal, holding that the school had unfairly discriminated against the learner.

15 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 58.
16 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 58.
17 *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 7 BCLR 771 (CC), paras 27, 32.
18 *President of the Ordinary Court Martial v Freedom of Expression Institute* 1999 4 SA 682 (CC) 16, 17 and 18. See also Loots "Standing, Ripeness and Mootness" 20.
19 *S v Manamela* 2000 5 BCLR 491 (CC) para 12. See also *Independent Electoral Commission v Langeberg Municipality* 2001 9 BCLR 883 (CC) para 11; *AAA Investments Pty (Ltd) v Micro Finance Regulatory Council* 2006 11 BCLR 1255 (CC) para 27.
20 *MEC for Education, KwaZulu-Natal v Pillay* 2008 2 BCLR 99 (CC).

The School and the MEC for Education in KwaZulu-Natal appealed against the decision of the High Court to the Constitutional Court. By the time the matter was heard in the Constitutional Court the learner had matriculated and left the school. Because of this and the fact that the National Department of Education had issued new guidelines – which in her view changed the legal landscape – as a result of the litigation, the respondent contended that the matter had become moot.[21] The Court conceded that the learner's departure from the school in question rendered the case moot,[22] but the Court disagreed that the matter was moot also because of the new guidelines issued by the Department.[23]

The Court's rejection of the respondent's argument that the new guidelines altered the legal landscape was prompted by the nature of the guidelines. The Court considered the language in which the guidelines were couched and concluded that the guidelines were non-binding on schools. In the view of the Court the guidelines hardly changed the legal position as[24]

> …schools…might consider the guidelines and lawfully decide to adopt exactly the same provision that is before us. Any aggrieved party would be entitled to bring exactly the same challenge.

The Court further justified its decision to proceed with the hearing by pointing to the effectiveness of the order it would make if the case was heard. In particular the Court stated:[25]

> There is accordingly no doubt that the order, if the matter is heard, will have a significant practical effect on the School and all other schools in the country.... It is therefore in the interests of justice to grant leave to appeal.

The Constitutional Court has recently endorsed the above approach in *Pheko v Ekurhuleni Metropolitan Municipality*.[26] In this case the applicants, who had been evicted from their homes without a court order, sought leave to appeal against an unfavourable decision by the court a *quo*. The respondent opposed the application

21 *MEC for Education, KwaZulu-Natal v Pillay* 2008 2 BCLR 99 (CC) para 28.
22 *MEC for Education, KwaZulu-Natal v Pillay* 2008 2 BCLR 99 (CC) para 32.
23 *MEC for Education, KwaZulu-Natal v Pillay* 2008 2 BCLR 99 (CC) para 33.
24 *MEC for Education, KwaZulu-Natal v Pillay* 2008 2 BCLR 99 (CC) para 34.
25 *MEC for Education, KwaZulu-Natal v Pillay* 2008 2 BCLR 99 (CC) para 35.
26 *Pheko v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC).

on the ground, *inter alia*, that the matter had become moot as the applicant had already been moved. The Court disagreed. It stated that not only were the rights of the applicants infringed, but there was a threat of further infringement.[27] The Court further stated that the matter still presented live controversy and the applicants would benefit from the order it might make if the matter was heard. In particular the Court stated:[28]

> Although the removal has taken place, this case still presents a live controversy regarding the lawfulness of the eviction. Generally, unlawful conduct is inimical to the rule of law and to the development of a society based on dignity, equality and freedom. Needless to say, the applicants have an interest in the adjudication of the constitutional issue at stake. The matter cannot therefore be said to be moot. It is also live because if we find that the removal of the applicants was unlawful, it would be necessary to consider their claim for restitutionary relief. (footnotes omitted).

It is submitted that the Constitutional Court followed the correct approach to the question of mootness in both the *Pillay* and *Pheko* cases. The doctrine of mootness allows a court to decide a moot case if there is a possibility of the infringement complained of in the current matter being repeated in the future. In the *Pillay* case, unless the Constitutional Court confirmed the finding of the High Court – as it essentially did – the soft nature of the new guidelines issued by the Department as a result of the litigation meant that the threat of harm to learners' religious and cultural rights around the country continued. In the *Pheko* case, indeed, the failure by the Court to rule on whether or not an eviction without a court order contravened section 26(3) of the *Constitution* would have created legal uncertainty. This posed a big threat of future infringements. Thus it would benefit not only the applicants for the Court to decide the matter, but society as a whole.

In 1997 parliament inserted section 21A into the *Supreme Court Act*[29] to give the Supreme Court of Appeal or any High Court sitting as a court of appeal the discretion to dismiss an appeal if the circumstances are such that the order it might give will have no practical effect or result.[30] According to the Supreme Court of Appeal the effect of section 21A was to do away with such ambiguous concepts as "abstract",

27 *Pheko v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) para 31.
28 *Pheko v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) para 32..
29 *Supreme Court Act* 59 of 1959, as amended.
30 Loots "Standing, Ripeness and Mootness" 21. She points out that the amendment was enacted in 1993, but came into effect only on 14 February 1997.

"academic" or "hypothetical" as criteria for the exercise of the power of a court of appeal not to hear an appeal.[31] Instead, the Court held, "…section 21A imposes a positive test: Will the judgment or order have a practical effect or result."[32] According to the Supreme Court of Appeal in *Western Cape Education Department v George*, the practical effect or result requirement of section 21A[33]

> …was wide enough to include a practical effect or result in some other respect, such as a matter of wide public interest or urgency, or to resolve conflicting High Court decisions.

While there is no equivalent of section 21A in respect of the Constitutional Court, the Court has held that it has discretion to exercise its powers in terms of section 172(2) of the final *Constitution* to entertain a confirmation proceeding even when the issue in the case has become moot[34] and that in exercising this discretion it would consider if any order it may make would have any practical effect, either on the parties or on others.[35] The rule also finds application in respect of appeals to the Constitutional Court.[36]

4.2 Applying the mootness doctrine in Christian Roberts

As stated above, pending judgment in the case *Christian Roberts* the government had conceded defeat by removing the discriminating provisions in the *Social Assistance Act*, so that ultimately – that is, in 2010 – both men and women would access old age social grants at the age of 60. Thus at the time of delivery of the judgment, as was the position in the *JT Publishing; Freedom of Expression Institute*[37] and *Uthukela District Municipalities v President of the Republic of South Africa*[38] - three cases which are almost identical to the *Christian Roberts* case as they involved

31 In *Premier, Provinsie, Mmpulanga v Groblerdalse Stadsraad* 1998 2 SA 1136 (SCA) 114D-F, as referred to in Loots "Standing, Ripeness and Mootness" 21.
32 *Premier, Provinsie Mmpulanga v Groblerdalse Stadsraad* 1998 2 SA 1136 (SCA) para 114 D-F.
33 *Western Cape Education Department v George* 1998 3 SA 77 SCA 84D-E.
34 In *President of the Ordinary Court Marshal v Freedom of Expression Institute* 1999 4 SA 682 (CC) para 16. See also *MEC for Education, KwaZulu-Natal v Pillay* 2008 2 BCLR 99 (CC) para 35.
35 *President of the Ordinary Court Marshal v Freedom of Expression Institute* 1999 4 SA 682 (CC) para 16.
36 See *Independent Electoral Commission v Langeberg Municipality* 2001 9 BCLR 883 (CC) para 9.
37 *President of the Ordinary Court Marshal v Freedom of Expression Institute* 1999 4 SA 682 (CC).
38 *Uthukela District Municipalities v President of the Republic of South Africa* 2002 11 BCLR 1220 (CC).

a change in the offending legislation pending judgment – the controversy had ceased to be a live one, and the issues had become wholly academic, and indeed excited no interest but a historic one.

It must, however, be asked if the court in *Christian Roberts* felt that it had to decide the matter despite it's being moot? We must ask this question because, as was shown above, a court has discretion to decide a moot case in exceptional circumstances. A reading of the above cases suggests that there are two discernible exceptions to the judicial policy governing moot cases. The first instance would be when it is in the public interest or society at large to decide the matter. The rationale here is that the case is moot only as between the parties, but there remains a need to guide future situations of a similar nature. The second instance, also related to the first one, is when the offending practice or conduct is capable of repetition. Both of these instances satisfy an essential underlying requirement, which is that the declaratory order must be of practical effect or advantage to someone. The answer to the question posed above in relation to the *Christian Roberts* matter is in the negative. As was the position in the three similar cases referred to above, there existed no such exceptional circumstances in the *Christian Roberts* case compelling the court to decide the matter. It is not difficult to see why that is so. A change in the offending legislation in this case – as in the other three cases – put the entire case to bed. There is certainly no future guidance to be provided to society at large by the *Christian Roberts* judgment. And indeed there is no threat of repetition of the offensive conduct without enabling legislation. Therefore the Court should have declined giving judgment in the matter.

5 The approach to costs in constitutional litigation

5.1 General principles

As a general approach to costs awards, the Constitutional Court in *Ferreira v Levin*[39] stated that factors such as the "conduct of the parties", the "conduct of their legal representatives", "whether a party achieves a technical victory only", the "nature of

39 *Ferreira v Levin; Vryehoek v Powell* 4 BCLR 441 (CC).

the litigants" and the "nature of the proceedings" were influential in the consideration by a court of whether or not to deprive a victorious party of their costs. The Court went on to state that: [40]

> …[T]he 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 [the factors] offer a useful point of departure. If the need arises the rules may have to be substantially adapted; this however should 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. (footnotes omitted).

Some two years later Ackerman J, who wrote the decision in *Ferreira v Levin* above, was of the view in *Motsepe v Commissioner for Inland Revenue*[41] that the time had come for the Constitutional Court to develop a general rule in relation to costs awards in constitutional litigation. In this regard he stated that[42]

> …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, lest such orders have an unduly inhibiting or "chilling" effect on other potential litigants in this category. 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.

The Court felt that the conduct of the applicant in this case was objectionable for a number of reasons and thus punished the applicant with a costs order.

The Court later endorsed this rule in *Affordable Medicines Trust*[43] as an important principle in dealing with costs awards in constitutional cases between private parties and the State. The applicants in the court *a quo* had achieved partial success in that certain sub-regulations to the legislation they attacked on constitutional grounds were found unconstitutional by the court of first instance. Despite this, the court *a quo* saddled the applicants with costs on the basis that the applicants were not

40 *Ferreira v Levin; Vryehoek v Powell* 4 BCLR 441 (CC) para 3.
41 *Motsepe v Commissioner for Inland Revenue* 1997 6 BCLR 692 (CC).
42 *Motsepe v Commissioner for Inland Revenue* 1997 6 BCLR 692 (CC) para 30.
43 *Affordable Medicines Trust v Minister of Health* 2005 6 BCLR 529 (CC).

"indigent as they were in a position to finance the litigation and had done so 'with vigour'".[44] The Constitutional Court stated that as a general rule "in constitutional litigation an unsuccessful litigant ought not to be ordered to pay costs".[45] The Court went on to state that: [46]

> The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their rights. But this is not an inflexible rule. There may be circumstances that justify a departure from this rule such as where the litigation is frivolous and vexatious. There may be conduct on the part of the litigant that deserves censor by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do what is just having regard to the facts and circumstances of the case.

The Court thus reversed the costs order by the court *a quo* and ordered that each party keep their own costs.

More recently the Constitutional Court affirmed this approach to costs in litigation with a constitutional dimension in *Biowatch Trust v Registrar, Genetic Resources*.[47] This was an appeal by the applicant against the costs order of the North Gauteng High Court (the "High Court"). Litigation in this case was precipitated by refusal by the Registrar of Genetic Resources (a state functionary) to provide the applicant certain information in the possession of the Registrar pertaining to the production of genetically modified food. Among other things the applicant complained that the Registrar's conduct violated its right to information held by the State in terms of section 32 of the *Constitution*.[48] The applicant was successful in the litigation in that it had been given access to the information it sought and which it was entitled to receive (not confidential information). The High Court, however, gave a punitive costs order against the applicant on the basis that the applicant had not been specific enough in its request about the precise information sought.

44 *Affordable Medicines Trust v Minister of Health* 2005 6 BCLR 529 (CC) para 139.
45 *Affordable Medicines Trust v Minister of Health* 2005 6 BCLR 529 (CC) para 138.
46 *Affordable Medicines Trust v Minister of Health* 2005 6 BCLR 529 (CC) para 38.
47 *Biowatch Trust v Registrar, Genetic Resources* 2009 10 BCLR 1014 (CC).
48 *Constitution of the Republic of South Africa Act*, 1996.

The Constitutional Court severely reprimanded the High Court for the approach it took in relation to costs in this matter. The Court recalled its approach to costs awards in constitutional litigation and stated: [49]

> In litigation between the government and a private party seeking to assert a constitutional right, *Affordable Medicines* established the principle that ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs. (footnotes omitted).

The Court stated that the rationale for this principle is three-fold. In the first place, the Court observed, the rule[50]

> diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse.

The second reason concerns the reach of the outcome in a constitutional matter, its contribution to jurisprudence, as well as its meaning to South Africans. In the words of the Court: [51]

> [C]onstitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy.

The third reason behind the principle, according to the Court, concerns the bearer of the primary responsibility to ensure that both the law and the conduct of the state are compatible with the *Constitution*, as well as the reasons for the litigation. More specifically, the Court observed: [52]

> Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is

49 *Biowatch Trust v Registrar, Genetic Resources* 2009 10 BCLR 1014 (CC) para 22.
50 *Biowatch Trust v Registrar, Genetic Resources* 2009 10 BCLR 1014 (CC) para 23.
51 *Biowatch Trust v Registrar, Genetic Resources* 2009 10 BCLR 1014 (CC) para 23.
52 *Biowatch Trust v Registrar, Genetic Resources* 2009 10 BCLR 1014 (CC) para 23.

> appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door. (footnotes omitted)

The Court reversed the costs order in favour of the applicant both in the High Court and in the Constitutional Court for a number of reasons: In the first place the Court affirmed the general rule that a successful party should have its costs paid by the losing side. The Court observed that: [53]

> In the present matter, Biowatch achieved substantial success. Not only did it manage to rebut a number of preliminary objections aimed at keeping the case out of court altogether, it also succeeded in getting a favourable response from the Court to eight of the eleven categories of information it sought.

The second reason concerned the failure by the High Court to consider the constitutional aspect of the case. The Court noted that in granting the application for leave to appeal against his costs order to the Full Bench, the single judge conceded overlooking the constitutional dimension of the litigation when awarding costs and merely stated that it had been "at the back of his mind". This, however, did not save the judge's mishap from criticism by the Court. The Court found that[54]

> …his failure to expressly locate the costs award in a constitutional setting must raise serious doubts as to the weight, if any, given to the constitutional context.

Before approaching the Constitutional Court, the applicant had appealed to the Full Bench of the High Court against the costs order. The Full Bench had similarly dismissed the appeal without considering the constitutional aspect of the case. The Court was particularly sharp in its language against the Full Bench for its failure to consider the constitutional dimension to the litigation in its consideration of the appeal. In particular, the Court said that "the omission [by the Full Bench] of the constitutional dimension constitutes a serious misdirection".[55]

The third reason was that the Court found nothing untoward about the conduct of the applicant during litigation that would justify – not even the lack of specificity in the

53 *Biowatch Trust v Registrar, Genetic Resources* 2009 10 BCLR 1014 (CC) para 43.
54 *Biowatch Trust v Registrar, Genetic Resources* 2009 10 BCLR 1014 (CC) para 41.
55 *Biowatch Trust v Registrar, Genetic Resources* 2009 10 BCLR 1014 (CC) para 42.

applicant's requests for information complained of by the single judge – a punitive costs order against the applicant. Furthermore, the applicant's case was neither frivolous nor vexatious, according to the Court. In this regard the Court stated: [56]

> The lack of precision and the sweeping character of the requests for information as well as of the claims made in the notice of motion had not prevented the High Court from being able to give a thorough and well-substantiated judgment on the merits. Far from being frivolous or vexatious, the application raised important constitutional issues and achieved considerable success.

The fourth reason had to do with why the applicant was forced to litigate in the first place. The Court pointed out that it was the State's failure to provide the information sought which triggered the litigation. Thus in the words of the Court:[57]

> Biowatch had been compelled to go to court. The root cause of the dispute had been the persistent failure of the governmental authorities to provide legitimately-sought information. They were obliged to pass on information in their possession, save only for material which could reasonably be withheld in order to protect certain prescribed interests. As the High Court ultimately found, the bulk of the requests referred to information that had indeed to be disclosed. Only after four requests had been made to different state officials, without success, was litigation embarked upon. (footnote omitted)

The fifth reason concerned the question as to who bears the primary responsibility to ensure that both the law and State conduct are consistent with the *Constitution*. The Court found that the state was the bearer of this responsibility, and that it had failed to discharge this duty by not providing legitimately sought information which it was legally obliged to release. The Court held that:[58]

> Not only did the appropriate officials fail to fulfil their constitutional and statutory duties in providing information, thus compelling Biowatch to litigate, the governmental agencies compounded this by obdurately raising a series of unsustainable technical and procedural objections to Biowatch's suit.

Notably in the *Biowatch* case the Court did not simply recite the rule as developed in the abovementioned cases, but added the welcome element of considering who bears the primary responsibility to ensure that both the law and state conduct are at one with the *Constitution*.

56 *Biowatch Trust v Registrar, Genetic Resources* 2009 10 BCLR 1014 (CC) para 43.
57 *Biowatch Trust v Registrar, Genetic Resources* 2009 10 BCLR 1014 (CC) para 44.
58 *Biowatch Trust v Registrar, Genetic Resources* 2009 10 BCLR 1014 (CC) para 37.

5.3 Public interest litigation and costs in the Constitutional Court

As pointed out above, there is no discernible reason as to why the Court in *Christian Roberts* gave judgment, except to punish the applicants and the *amici* with a costs order. This has significant implications for the development of constitutional jurisprudence in general and for public interest litigation in particular.

In *Biowatch* the applicants and the *amici*[59] pointed out to the Court the role played by public interest advocacy groups in advancing constitutional litigation. They contended that an adverse costs award would not only inhibit the institution of litigation in the public interest but would also be disastrous to their "…capacity… to exist and do their work".[60] They further argued that the "High Court misdirected itself in not giving any, or sufficient, regard to the fact that Biowatch was a public interest NGO litigating not on its own behalf but in the public interest. Sachs J, on behalf of the majority, dismissed this contention. He stated that in his view the correct starting point in determining costs in a constitutional litigation should not be who the parties are, but the nature of the issues.[61] He further stated that:[62]

> 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.

Sachs J further emphasised the obligation that the courts be impartial towards the litigants who appear before them, and that no litigant should be favoured over the other in awarding costs because of their social status. In particular, he stated that[63]

> …litigants should not be treated disadvantageously in making costs and related awards simply because they are pursuing commercial interests and have deep pockets. Nor should they be looked upon with favour because they are fighting for the poor and lack funds themselves. What matters is whether rich or poor,

59 The Centre for Child Law, Lawyers for Human Rights and the Centre for Applied Legal Studies.
60 *Biowatch Trust v Registrar, Genetic Resources* 2009 10 BCLR 1014 (CC) para 15.
61 *Biowatch Trust v Registrar, Genetic Resources* 2009 10 BCLR 1014 (CC) para 16.
62 *Biowatch Trust v Registrar, Genetic Resources* 2009 10 BCLR 1014 (CC) para 16
63 *Biowatch Trust v Registrar, Genetic Resources* 2009 10 BCLR 1014 (CC) para 17.

> advantaged or disadvantaged, they are asserting rights protected by the Constitution.

He concluded that the nature of the issues and the manner in which the litigants conducted themselves during the proceedings should be decisive in determining the award of costs in constitutional litigation. In his words:[64]

> …a party should not get a privileged status simply because it is acting in the public interest or happens to be indigent. It should be held to the same standards of conduct as any other party, particularly if it has had legal representation. This means it should not be immunised from appropriate sanctions if its conduct has been vexatious, frivolous, professionally unbecoming or in any other similar way abusive of the processes of the Court.

It is submitted that Sachs J's views on how to approach the issue of costs in litigation instituted in the public interest seem not to be entirely congruent with the rapidly rising tide of cases cautioning against awarding adverse costs orders against public interest advocacy groups which raise constitutional issues. In these cases the significance of the role played by these groups has been singled out by the courts. As early in our constitutional dispensation as 1996, Mohamed DP, in *Ex parte Gauteng Legislature,*[65] cautioned against discouraging persons trying to vindicate their constitutional rights from doing so by the risk of attracting an adverse costs order if they lost the case on merits. Mohamed DP in particular stated that persons seeking[66]

> …to ventilate an important issue of constitutional principle … should not be discouraged from doing so by the risk of having to pay the costs of their adversaries, if the Court takes a view which is different from the view taken by the petitioner. This, of course, does not mean that such litigants can be completely protected from that risk. The Court, in its discretion, might direct that they pay the costs of their adversaries if, for example, the grounds of attack on the impugned statute are frivolous or vexatious or they have acted from improper motives or there are other circumstances which make it in the interest of justice to direct that such costs should be paid by the losing party.

64 *Biowatch Trust v Registrar, Genetic Resources* 2009 10 BCLR 1014 (CC) para 17.

65 *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995,* 1996 3 SA 165 (CC).

66 *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995,* 1996 3 SA 165 (CC) para 36.

Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole[67] is another case where the Constitutional Court declined to award costs in favour of the State, where the applicant had withdrawn the referral to the Court after the relief sought had become moot. This was on the basis that the "applicants' complaints were not frivolous or vexatious and there can be no suggestion that they acted on improper motives".

Langa J in *Democratic Alliance v Masondo* considered the fact that the litigation was in the public interest as an important factor in determining costs and reversed an adverse court *a quo* costs order against the applicant. He observed that:[68]

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

In *City of Cape Town v Robertson,* the Constitutional Court refused to make an order of costs despite the respondent's being unsuccessful in contending that the rates policies of the City of Cape Town were unconstitutional.[69] The Court, per Moseneke J, in justifying its refusal stated that:[70]

> The respondents sought to vindicate a constitutional protection. Nothing before us suggests that they ought to be mulcted for costs for doing so. On the contrary, an order as to costs against the respondents would be inappropriate. I plan to make none. In my view it would be fair and just that the parties pay their own costs in the High Court and before this Court.

As can be seen from the foregoing discussion, there is a growing set of cases heard by the Constitutional Court where the Court regarded the nature of the litigation – particularly public interest litigation – as an important factor in exercising its discretionary powers in relation to costs awards. The court in *Christian Roberts* should have taken note of this trend.

67 *Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole v Premier, Province of the Free State* 1998 3 692 (CC), as discussed in Biowatch 2007 www.biowatch.org.za.
68 *Democratic Alliance v Masondo* 2003 2 BCLR 128 (CC) para 35.
69 *City of Cape Town v Robertson* 2005 2 SA 323 (CC).
70 *City of Cape Town v Robertson* 2005 2 SA 323 (CC) para 79.

5.4 Public interest litigation and costs in other South African courts

Apart from the Constitutional Court, other South African courts have also pronounced on the significance of taking public interest litigation as an important factor in determining costs. This section looks at some of these cases, in which the ordinary common law principles relating to cost orders were departed from.

In *Hlatshwayo v Hein* the Land Claims Court recognised that before it was a case that could be "recognised as falling under a new era of public interest litigation" and that "[t]his tends to set it apart from conventional litigation". The Court further stated that:[71]

> …our law recognises that in the exercise of its discretion relating to costs a court may deprive a successful party of his or her costs and the trend in the Constitutional Court at least appears to be in the direction of recognising public interest cases as one of those circumstances where it may be appropriate to do so.

In *Silvermine Valley Coalition,* the Cape High Court – in an environmental law context – made a pertinent observation regarding costs in public interest litigation. In this case there was a failed attempt by the applicant to prevent the development of a vineyard in a nature conservation area. In determining costs, the Court stated:[72]

> NGOs should not have unnecessary obstacles placed in their way when they act in a manner designed to hold the State and indeed the private community to the constitutional commitments of our new society, which includes the protection of the environment.

In *Rates Action Group v City of Cape Town*, the Court refused to make an adverse costs order against the applicant despite the applicant's losing the case.[73] The applicant had challenged the power of a Municipality to levy service charges comprising "partly property rates" and "partly service fees". The Court held that "even though the interests the applicant seeks to promote are the private interests of the individuals whom it represents, the applicant raises a constitutional issue of

71 *Hlatshwayo v Hein* 1999 2 SA 834 (LCC) para 22.
72 *Silvermine Valley Coalition v Sybrand Van der Spuy Boerderye* 2002 1 SA 478 (C) 491-493.
73 *Rates Coalition Group v City of Cape Town* 2004 5 SA 545 (C).

substance and of public interest" as the applicant was seeking to "ventilate an important issue of constitutional principle".[74]

The Witwatersrand Local Division in *Nzimande v Nzimande*, stated that where the litigants sought to test the implementation and application of a statute with socio-economic implications, then "[s]uch persons should not be discouraged from doing so by the risk of having to pay the costs of their adversaries, if the Court takes a view which is different from the view taken by the appellant", as long as "the grounds of attack on the impugned statute are not acted from improper motives or there are other circumstances which make it in the interests of justice to direct [that] such costs should be paid by the losing party."[75]

In *Institute for Democracy in South Africa* the Cape High Court concisely summed up the approach to costs in public interest litigation raising constitutional issues as follows:[76]

> The guiding principle in this regard appears to be that the question of costs in constitutional and public interest litigation remains a discretionary matter. However, parties who litigate to test the constitutionality of law or conduct usually seek to ventilate important issues relating to constitutional principle. Such persons should not be discouraged from doing so by running the risk of having to pay the costs of their adversaries, if the court takes a view which is different from the view taken by the petitioner. These principles have been applied uniformly where litigation is against an organ of State. The same principles apply in cases involving private litigants where a party litigates for public purposes and in the public interest. The Court's discretion could be exercised against a private litigant, however, *inter alia*, where the litigation was spurious or frivolous or where such litigant has not acted in good faith or where it was apparently pursuing private commercial interests. In my view, the applicants in the present case raised matters of great public interest and concern - not for any benefit or advantage to themselves, but *bona fide* and for the common good, as perceived by them. Moreover, the points they raised, though ultimately unsuccessful, were not without merit. In line with the general approach outlined above, I am of the view that it would be fair if no order as to costs were made, thus leaving each party to pay its own costs.

The trend therefore appears to have been followed by other courts in South Africa that the judicial discretion in relation costs awards in a constitutional litigation, particularly against the State, brought in the public interest – unless the application is

74 *Rates Coalition Group v City of Cape Town* 2004 5 SA 545 (C) para 113.
75 *Nzimande v Nzimande* 2005 1 SA 83 (W) para 75.
76 *Institute for Democracy in South Africa v African National Congress* 2005 5 SA 39 (C) paras 60-62.

frivolous or vexatious or the applicant behaved in an objectionable manner – is to be exercised in such a manner that it does not lead to adverse costs orders against such litigants, particularly where they are unsuccessful.

5.5 Public interest litigation and costs in other countries

This section briefly looks at other countries which share South Africa's general rules on costs award, perhaps as a result of sharing the same common law heritage with South Africa. Their jurisprudence is particularly helpful as these countries appear to take the same approach as our courts in relation to costs in public interest litigation.

5.5.1 The United Kingdom

In the United Kingdom the attitude of courts in relation to costs in public interest litigation is succinctly set out in *R (Corner House Research) v Secretary of State for Trade and Industry*.[77] In this case the Court of Appeal stated that[78]

> some … authorities… demonstrate a trend towards protecting litigants, who reasonably bring public law proceedings in the public interest, from the liability to costs that falls, as a general rule, on an unsuccessful party.

Unlike in South Africa, there is another mechanism through which public interest litigants can shield themselves from a potentially economically ruinous costs order. This is done through the so-called "Protective Costs Order", in terms of which a party may approach the court ahead of a hearing for an order limiting the party's liability for costs should it be unsuccessful. This mechanism was used in the recent case of *Campaign Against Arms Trade v BAE Systems PLC*.[79]

77 *R (Corner House Research) v Secretary of State for Trade and Industry* 2005 1 WLR 2600 per Brook J. See Biowatch 2007 www.biowatch.org.za para 13.3, also citing the case of *R v Secretary of State for the Environment ex p Shelter* 1997 COD per Carnwath J.

78 *R (Corner House Research) v Secretary of State for Trade and Industry* 2005 1 WLR 2600 para 41.

79 *Campaign Against Arms Trade v BAE Systems PLC* 2007 EWHC 330 (QB) per King J, as discussed in *R (Corner House Research) v Secretary of State for Trade and Industry* 2005 1 WLR 2600 para 13.4, also referring to *R v The Prime Minister ex p CND* 2002 EWHC 2712 (Admin) and *King v Telegraph Group Limited* 2005 1 WLR 2282.

5.5.2 Canada

The Canadian Courts also accord significance to public interest litigation as a factor to be taken into account in determining costs. In *Mahar v Rogers Cable Systems Ltd* the Court stated:[80]

> (I)t is fair to characterise this proceeding as a public interest suit. While the ordinary cost rules apply in public interest litigation, those rules do include a discretion to relieve the loser of the burden of paying the winner's costs and that discretion has on occasion been exercised in favour of public interest litigants. … In my view, it is appropriate in this case to exercise my discretion in favour of the applicant and to make no order as to costs. The issue raised was novel and certainly involved a matter of public interest. While I decided the jurisdictional point against the applicant, I am satisfied that the application was brought in good faith for the genuine purpose of having a point of law of general public interest resolved.

In *B (R) v Children's Aid Society of Metropolitan Toronto*, there was an unsuccessful application by certain Jehova's Witnesses, who contended that their *Charter* rights had been infringed when a blood transfusion was administered to their daughter despite their disapproval.[81] The District Court ordered that the Attorney-General who had intervened in the case pay the costs of the applicants.[82] The order was upheld by both the Ontario Court of Appeal and the Supreme Court of Canada.

The special significance of public interest litigation as a factor in the consideration of costs was endorsed in the *Okanagan Indian Band* case,[83] which involved a challenge by the Okanagan Indian Band to a prohibition on logging on their land without the loggers having obtained prior approval. They contended that the prohibition infringed their constitutionally protected aboriginal rights. With regards to costs, the Supreme Court of Canada stated:[84]

80 *Mahar v Rogers Cable Systems Ltd* 1995 25 OR (3rd) 690 (General Division) 703b, quoting Orkin *Law of Costs* 2-33 to 2-34). See Biowatch 2007 www.biowatch.org.za para 13.5.

81 *B (R) v Children's Aid Society of Metropolitan Toronto* 1995 1 SCR 315, as discussed in Biowatch 2007 www.biowatch.org.za para.6.

82 *B (R) v Children's Aid Society of Metropolitan Toronto* 1995 1 SCR 315 para 122. Also referring to *Canadian Newspapers C. v Attorney-General of Canada* 1986 32 DLR (4th) 292 (Ont HCJ); *Re Lavigne and Ontario Public Service Employees Union (No.2)* 1987 60 OR (2nd) 486 (HCJ).

83 *British Columbia (Minister of Forests) v Okanagan Indian Band* 2003 3 SCR 371 (SCC), as discussed in Friedlander 1995 *McGill L J* 55; Tollefson 2006 *Can J Admin Law Pract* 39.

84 *British Columbia (Minister of Forests) v Okanagan Indian Band* 2003 3 SCR 371 (SCC) para 27.

> [A] consideration relevant to the application of costs rules is access to justice. This factor has increased in importance as litigation over matters of public interest has become more common, especially since the advent of the Charter. In special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.

5.5.3 New Zealand

In New Zealand too, public interest litigation is encouraged *inter alia* by shielding that category of litigants from adverse costs orders where the applications are genuine. In *New Zealand Maori Council v Attorney-General of New Zealand* the Privy Council let the parties keep their own costs even though the appellants had been unsuccessful. This was because the appellants, said the Board, did not litigate for private gain, but "in the interests of *taonga* which is an important part of the heritage of New Zealand".[85]

This approach to costs in public interest litigation by the Privy Council was affirmed in the recent case of *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment.* Although the applicants were unsuccessful in their application for an interim order to stop the continued construction of a hydro-electric scheme, the Board declined to make an order as to costs. It was stated that "the board has decided that because this was a public interest case there should be no order to the costs of appeal, including the proceedings of the conservatory order".[86]

5.5.4 Australia

In Australia the matter of costs in public interest litigation had received the attention of the Australian Law Reform Commission (hereinafter the "ALRC"). In 1995 the

85 *New Zealand Maori Council v Attorney-General of New Zealand* 1994 1 AC 466, as quoted in Biowatch 2007 www.biowatch.org.za para 13.9.

86 *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* 2003 UKPC 63; Order of the Privy Council 29 January 2003. See Biowatch 2007 www.biowatch.org.za 10.

ALRC published a report[87] in which it stated that public interest litigation was an "important mechanism for clarifying legal issues to the benefit of the general community, and commented that what it described as 'the costs indemnity rule' had a deterrent effect on this type of litigation".[88] The ALRC recommended that "courts or tribunals should have power to make public interest costs orders at any stage of the proceedings, and suggested criteria which should be taken into account when determining what type of order to make".[89] It was suggested that it might be ordered that each party bear its own costs, or that: [90]

> …the party applying for the public interest costs order, regardless of the outcome of the proceedings, shall not be liable to pay the other party's costs; …only be liable to pay a specified proportion of the other party's costs; or … be able to recover part of his or her costs from the other party.

In *Oshlack v Richmond Council,* the High Court of Australia upheld a decision by the court *a quo* not to award costs in favour of the respondents who successfully defended an application aimed at preserving endangered fauna. In the Court's view there were "sufficient special circumstances to justify departure from the ordinary rules as to costs". These circumstances, according to the Court, included the fact that, firstly, "[t]he appellant had nothing to gain from the litigation other than the worthy motive of seeking to uphold environmental law and the preservation of endangered fauna". Secondly, "[a] significant number of members of the public shared the appellant's stance, so that in that sense there was a public interest in the outcome of the litigation". And, thirdly, according to the Court, [91]

> …the challenge had raised and resolved significant issues as to the interpretation and future administration of statutory provisions relating to the protection of endangered fauna and the present and future administration of the development consent in question, which had implications for the council, the developer and the public.

The jurisprudence in these countries thus points to a settled international legal position in relation to costs in public interest litigation. Notwithstanding Sachs J's remarks in *Biowatch*, there appear to be no compelling reasons why South African

87 ALRC 1995 www.alrc.gov.au.
88 ALRC 1995 www.alrc.gov.au para 13.8. See Biowatch 2007 www.biowatch.org.za para 13.11.
89 Biowatch 2007 www.biowatch.org.za para 13.11.
90 Biowatch 2007 www.biowatch.org.za para 13.11.
91 *Oshlack v Richmond River Council* 1997 152 ALR 83 (HCA).

courts should not fully embrace this trend, which is designed to serve the twin goals of encouraging public interest litigation and to promote access to justice.

5.6 Applying the costs principles to Christian Roberts

I now turn to applying the costs principles discussed above to *Christian Roberts*.

5.6.1 Costs in constitutional litigation

The line of cases looked at above has established clear principles in relation to costs in constitutional litigation. Where a private litigant brings a case raising an important constitutional issue, such as testing the constitutionality of a statute, and loses the challenge, unless the challenge was bad or the private litigant behaved in an objectionable manner, a court must depart from the traditional common law principle regarding costs – that costs must follow the event – and order that each party keep its costs. It is thus submitted that while the Court had found against the applicants on the merits, the constitutional dimension precluded the judge from making an adverse costs order against the applicants and the *amici*. Furthermore, there existed no special circumstances in the case to justify departure from this important constitutional principle. It is admitted that the High Court costs orders in cases such as *Affordable Medicine*[92] and *Biowatch*[93] did perhaps set a precedent for the manner in which the Court in *Christian Roberts* exercised its judicial discretion in relation to costs in a litigation with a constitutional dimension, but these costs orders were sharply criticised and overturned on appeal.

5.6.2 Frivolous or vexatious applications

Secondly, it must be asked if the case was frivolous or vexatious, and if the applicants during litigation behaved in a manner justifying a punitive costs order against them. This must be asked because the Court did hint that the conduct of the

92 *Affordable Medicines Trust v Minister of Health* 2005 6 BCLR 529 (CC).
93 *Biowatch Trust v Registrar, Genetic Resources* 2009 10 BCLR 1014 (CC).

applicants (and the *amici*) was a factor in determining the costs award. In particular the Court made this (troubling) remark: [94]

> The *amici curiae*, in essence, had ganged with the applicants against the respondents … and they should be regarded as having failed in their quest, thus attracting costs against them.

This remark, which is the only discernible reason from the judgment as to why the Court punished the applicants with a costs order, is unfortunate indeed. There was nothing frivolous or vexatious about the conduct of both the *amici* and the applicants in this matter. Furthermore, there was nothing "spurious" about the grounds upon which the *amici* and the applicants attacked the legislation in question.

5.6.3 Costs in public interest litigation

Thirdly, not only was the matter brought to test the constitutionality of a statute, but it was also instituted in the public interest. As shown above, the trend – both in South Africa and abroad – is to shield this category of litigants from adverse costs orders, unless such litigants behave in a manner warranting punitive costs orders. There are dire implications for a public interest litigant where a court departs from this approach. The implications have financial, jurisprudential and access-to-justice dimensions. In the first place, public interest litigants are advocacy groups who rely on donor funding to carry out their activities, including seeking to realise the constitutional rights of indigent South Africans. Their important social contribution would be threatened by the risk of adverse costs whenever they are unsuccessful in genuine applications sought to vindicate constitutional rights.

Secondly, adverse costs orders against public interest litigants threaten to stall, if not reverse, the contribution this category of litigants has made and continues to make to the development of South African constitutional jurisprudence. The Court in *Biowatch*[95] recognised that the participation of public interest NGOs has led to the

94 *Christian Roberts v Minister of Social Development* Unreported Case No 32838/05 (TPD) para 41.

95 *Biowatch Trust v Registrar, Genetic Resources* 2009 10 BCLR 1014 (CC) para 19.

development of constitutional jurisprudence in areas such as access to housing,[96] access to land,[97] the rights of the child,[98] gender equality,[99] freedom of expression,[100] and the rights of gay men and lesbian women,[101] among others.

The third implication of ignoring this growing trend is to curtail access to the courts, and therefore access to justice. For instance, of the right of access to housing cases referred to, eviction cases constitute a majority. These often involve poor people. Without the support and participation of public interest groups such poor citizens would have very limited access to justice. It is thus submitted that the constitutional practice of shielding public interest litigants from adverse costs orders in genuine cases should be followed by all courts.

6 Conclusion

This note dealt with two issues emanating from the High Court's judgment in the *Christian Roberts* case, which have implications for constitutional law generally and public interest litigation in particular. The two issues are mootness and the approach to costs in litigation with a constitutional dimension, particularly between the state and a private litigant. It has been shown here that the decision by the state to amend the legislation complained of during litigation rendered the matter moot. This meant that judgment in the matter would be for purely academic purposes, as the violation

96 See for example *Occupiers of 51 Olivia Road, Berea Township and 197 Mainstreet Johannesburg v City of Johannesburg* 2008 5 BCLR 475 (CC); *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 1 BCLR 78 (CC); *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) and *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC).

97 See *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 8 BCLR 786 (CC) and *Alexkor Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC).

98 See *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 7 BCLR 637 (CC); *Gumede (born Shange) v President of the Republic of South Africa* 2009 3 BCLR 243 (CC); *AD v DW* 2008 4 BCLR 359 (CC); *S v M (Centre for Child Law as Amicus Curiae)* 2007 12 BCLR 1312 (CC); *Bhe v Magistrate, Khayelitsha* (*Commission for Gender Equality as Amicus Curiae*); *Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 BCLR 1 (CC).

99 See for example *Van der Merwe v Road Accident Fund* 2006 6 BCLR 682 (CC); *K v Minister of Safety and Security* 2005 9 BCLR 835 (CC) and *Carmichele v Minister of Safety and Security* 2001 10 BCLR 995 (CC).

100 See *Laugh It Off Promotions CC v South African Breweries International (Fincance) BV t/a Sabmark International* 2005 8 743 (CC); *South African Defence Union v Minister of Defence* 2007 8 BCLR 863 (CC) and *The Citizen 78 (Pty) Ltd v McBride* 2011 8 BCLR 816.

101 See *Fourie v Minister of Home Affairs* 2003 10 BCLR 1092 (CC) and *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC).

or threat of violation of the applicant's rights ceased as a result of the change in legislation. By proceeding to decide the merits in the matter, the High Court defied the caution by the Constitutional Court in *JT Publishing (Pty) Ltd* that courts should not exercise their judicial discretion to decide points which are abstract, academic or hypothetical.

It has also been demonstrated that the High Court did not follow the proper approach in respect to costs in litigation with a constitutional dimension brought against the State by a private party. In such matters the State should be ordered to pay the legal costs of the private litigant if he or she is successful. If the private litigant loses the challenge, each party should shoulder his or her legal costs. There are, however, exceptions to this general principle. If the challenge by the individual is frivolous or vexatious, or the grounds upon which the challenge rests are objectionable, the private litigant will not escape an adverse costs order.

It has been argued that the adverse costs awards against the applicants and the *amici* in the *Christian Roberts* were not justified as the conduct of the litigants was neither frivolous nor vexatious. Furthermore, the grounds upon which the impugned legislation and the accompanying regulations were challenged were above board as they precipitated an amendment of the statute complained of.

Finally, it has been shown that the implications of departing from this sensible approach to costs in public interest litigation are dire. Not only would the risk of attracting adverse costs orders in good constitutional challenges dishearten this group of litigants, but it would arrest the development of constitutional jurisprudence. Most significantly, keeping public interest groups away from courts through adverse costs orders would shatter the only hope that poor citizens currently have of accessing the courts, and therefore of accessing justice.

Bibliography

Barron and Dienes (eds) *Constitutional Law*

Barron J and Dienes T (eds) *Constitutional Law* (West St Paul, Min 1995)

Brilmayer 1979 *Harv L Rev*

Brilmayer L "The jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement" 1979 *Harv L Rev* 297-321

Diamond 1946 *U Pa L Rev*

Diamond S "Federal jurisdiction to decide moot cases" 1946 *U Pa L Rev* 125-147

Fountaine 1998 *Am U L Rev*

Fountaine C "Article III and the adequate and independent State grounds doctrine" 1998 *Am U L Rev* 1053-1100

Friedlander 1995 *McGill L J*

Friedlander L "Costs and the Public Interest Litigant" 1995 *McGill L J* 55-102

Loots "Standing, Ripeness and Mootness"

Loots C "Standing, Ripeness and Mootness" in Woolman S *et al* (eds) *Constitutional Law of South Africa* (Juta Cape Town 2012)

Peter and John *Federal Courts*

Peter W and John C *Federal Courts and the Law of Federal–State Relations* (Foundation Press New York 2004)

Orkin *Law of Costs*

Orkin M *The Law of Costs* (Canada Law Books Toronto 1994)

Tollefson 2006 *Can J Admin Law Pract*

Tollefson C "Costs and the Public Interest Litigant: *Okanagan Indian Band* and Beyond" 2006 *Can J Admin Law Pract* 39-61

Register of legislation

Constitution of the Republic of South Africa, 1996

Social Assistance Act 13 of 2004

Supreme Court Act 59 of 1959

Register of cases

Australia

Oshlack v Richmond River Council 1997 152 ALR 83 (HCA)

Canada

B (R) v Children's Aid Society of Metropolitan Toronto 1995 1 SCR 315 (SCC)

British Columbia (Minister of Forests) v Okanagan Indian Band 2003 3 SCR 371 (SCC)

Canadian Newspapers Co. v Attorney-General of Canada 1986 32 DLR (4th) 292 (Ont HCJ)

Mahar v Rogers Cable Systems Ltd 1995 25 OR (3rd) 690 (General Division)

Re Lavigne and Ontario Public Service Employees Union (No.2) 1987 60 OR (2nd) 486 (HCJ)

New Zealand

New Zealand Maori Council v Attorney-General of New Zealand 1994 1 AC 466

Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment 2003 UKPC 63

South Africa

AAA Investments Pty (Ltd) v Micro Finance Regulatory Council 2006 11 BCLR 1255 (CC)

AD v DW 2008 4 BCLR 359 (CC)

Affordable Medicines Trust v Minister of Health 2005 6 BCLR 529 (CC)

Alexkor Ltd v Richtersveld Community 2003 12 BCLR 1301 (CC)

Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa 2005 1 BCLR 1 (CC)

Biowatch Trust v Registrar, Genetic Resources 2009 10 BCLR 1014 (CC)

Carmichele v Minister of Safety and Security 2001 10 BCLR 995 (CC)

Christian Roberts v Minister of Social Development Unreported Case No 32838/05 (TPD)

City of Cape Town v Robertson 2005 2 SA 323 (CC)

Democratic Alliance v Masondo 2003 2 BCLR 128 (CC)

Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development 2009 7 BCLR 637 (CC)

Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995, 1996 3 SA 165 (CC)

Ex parte Nell 1963 1 SA 754 (A)

Ferreira v Levin; Vryehoek v Powell 1996 4 BCLR 441 (CC)

Fourie v Minister of Home Affairs 2003 10 BCLR 1092 (CC) and National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 12 BCLR 1517 (CC)

Government of the Republic of South Africa v Grootboom 2000 11 BCLR 1169 (CC)

Gumede (born Shange) v President of the Republic of South Africa 2009 3 BCLR 243 (CC)

Hlatshwayo v Hein 1999 2 SA 834 (LCC)

Independent Electoral Commission v Langeberg Municipality 2001 9 BCLR 883 (CC)

Institute for Democracy in South Africa v African National Congress 2005 5 SA 39 (C)

Jaftha v Schoeman; Van Rooyen v Stoltz 2005 1 BCLR 78 (CC)

JT Publishing (Pty) Ltd v Minister of Safety and Security 1996 1 BCLR 1599 (CC)

K v Minister of Safety and Security 2005 9 BCLR 835 (CC)

Laugh It Off Promotions CC v South African Breweries International (Fincance) BV t/a Sabmark International 2005 8 743 (CC)

Masuku v State President 1994 4 SA 374 (T)

MEC for Education, KwaZulu-Natal v Pillay 2008 2 BCLR 99 (CC)

Motsepe v Commissioner for Inland Revenue 1997 6 BCLR 692 (CC)

Nzimande v Nzimande 2005 1 SA 83 (W)

Occupiers of 51 Olivia Road, Berea Township and 197 Mainstreet Johannesburg v City of Johannesburg 2008 5 BCLR 475 (CC)

Oranje Vrystaatse Vereniging vir Staatsonderstuende Skole v Premier, Province of the Free State 1998 3 SA 692 (CC)

Pheko v Ekurhuleni Metropolitan Municipality 2012 4 BCLR 388 (CC)

Port Elizabeth Municipality v Various Occupiers 2004 12 BCLR 1268 (CC)

Premier, Provinsie Mmpulanga v Groblerdalse Stadsraad 1998 2 SA 1136 (SCA)

President of the Ordinary Court Martial v Freedom of Expression Institute 1999 4 SA 682 (CC)

President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2005 8 BCLR 786 (CC)

President of the Republic of South Africa v Hugo 1997 4 SA 1 (CC)

Rates Coalition Group v City of Cape Town 2004 5 SA 545 (C)

S v Dlamini; S v Dladla; S v Joubert; S v Schietekat 1999 7 BCLR 771 (CC)

S v M (Centre for Child Law as Amicus Curiae) 2007 12 BCLR 1312 (CC)

S v Manamela 2000 5 BCLR 491 (CC)

Silvermine Valley Coalition v Sybrand Van der Spuy Boerderye 2002 1 SA 478 (C)

South African Defence Union v Minister of Defence 2007 8 BCLR 863 (CC)

The Citizen 78 (Pty) Ltd v McBride 2011 8 BCLR 816

Uthukela District Municipalities v President of the Republic of South Africa 2002 11 BCLR 1220 (CC)

Van der Merwe v Road Accident Fund 2006 6 BCLR 682 (CC)

Western Cape Education Department v George 1998 3 SA 77 (SCA)

United Kingdom

Campaign Against Arms Trade v BAE Systems PLC 2007 EWHC 330 (QB)

King v Telegraph Group Limited 2005 1 WLR 2282

R (Corner House Research) v Secretary of State for Trade and Industry 2005 1 WLR 2600

R v Secretary of State for the Environment ex p Shelter 1997 COD

R v The Prime Minister ex p CND 2002 EWHC 2712 (Admin)

Register of internet sources

ALRC 1995 www.alrc.gov.au

Australian Law Reform Commission 1995 Costs Shifting – Who Pays for Litigation" (ALRC Report 75) www.alrc.gov.au/report-75 [date of use 2 Jun 2012]

Biowatch 2007 www.biowatch.org.za

Biowatch 2007 Heads of Argument Filed in *Biowatch Trust v Registrar, Genetic Resources* 2009 10 BCLR 1014 (CC) www.biowatch.org.za/docs/courtcase/bio_heads.pdf [date of use 2 Jun 2012]

Hall 2008 works.bepress.com

Hall M 2008 The Partially Prudential Doctrine of Mootness works.bepress.com/matthew_hall/1/ [date of use 1 Jun 2012]

List of abbreviations

ALRC	Australian Law Reform Commission
Am U L Rev	American University Law Review
Can J Admin Law Pract	Canadian Journal of Administrative Law and Practice
Harv L Rev	Harvard Law Review
McGill L J	McGill Law Journal
Syd L R	Sydney Law Review
U Pa L Rev	University of Pennsylvania Law Review