



CONSTITUTIONAL COURT OF SOUTH AFRICA

The Trustees for the time being of the Biowatch Trust v The Registrar, Genetic Resources, The Executive Council for Genetically Modified Organisms, The Minister for Agriculture, Monsanto South Africa (Pty) Ltd, Stoneville Pedigreed Seed Company and D&PL SA South Africa Inc (the Centre for Child Law, Lawyers for Human Rights and the Centre for Applied Legal Studies as *amici curiae*).

Case CCT 80/08

Date of judgment: 3 June 2009

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today, the Constitutional Court handed down judgment in the abovementioned matter which dealt with the approach that courts should adopt when making costs awards in constitutional litigation.

After a number of unsuccessful requests for information from governmental authorities responsible for monitoring the development of Genetically Modified Organisms (GMOs), Biowatch, a public interest non-governmental organisation (NGO) launched an application in the North Gauteng High Court for an order requiring the furnishing of certain The High Court granted eight out of eleven requests. It held that the non-disclosure constituted an infringement of Biowatch's constitutionally-protected right of access to information. Nevertheless, because of the sweeping nature of the requests made, the Court held that the governmental authorities should not be ordered to pay Biowatch's costs.

Monsanto, a multinational enterprise that has been developing GMOs in South Africa, had, with two other similar bodies, intervened in the proceedings to protect the confidentiality of information it had supplied to the authorities. The High Court held that Biowatch had compelled Monsanto to intervene and that Biowatch should pay Monsanto's costs.

Biowatch appealed to the Full Court against the two decisions on costs made by the High Court. By a majority of two to one, the Full Court rejected the appeal. Leave to appeal to the Supreme Court of Appeal having failed, Biowatch applied to this Court for leave to

appeal firstly, against the failure of the High Court to order the governmental authorities to pay its costs, and secondly, against the order that Biowatch should pay Monsanto's costs.

Sachs J, writing for a unanimous Court, noted that appellate courts are reluctant to interfere with the exercise of discretion in relation to costs awards, the more so when the appeal was based solely on questions of costs. Nevertheless, it was clear that the High Court had misdirected itself in not giving appropriate attention to the fact that this was a constitutional matter in which Biowatch was seeking to vindicate constitutional rights. The general rule in constitutional litigation is that an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs, unless the application is frivolous or vexatious or in any other way manifestly inappropriate. Biowatch was in fact substantially successful. The sweeping nature of its requests had not prevented the matter from being fully dealt with. The governmental authorities should accordingly pay Biowatch's costs.

Sachs J held that although Biowatch and Monsanto were both private parties, the litigation was not about a dispute between them, but about the failure of state officials to meet their constitutional obligations. Biowatch had secured a great deal of information, while Monsanto succeeded in protecting the confidentiality of some of the data it had provided. This was a new area of law, in which all the parties were feeling their way. In these circumstances, the costs award against Biowatch in favour of Monsanto should be set aside, and there should be no order as to costs.