SACHS J ABRIDGED JUDGMENT

Biowatch Trust v Registrar Genetic Resources and Others

Introduction

1. This case is all about costs awards, and only about costs awards. These awards ordinarily come at the tail-end of judgments as appendages to decisions on the merits. In this matter, however, they occupy centre-stage, indeed, the whole stage. The sole issue revolves around the proper judicial approach to determining costs awards in constitutional litigation.
2. The application for leave to appeal was prompted by two unfavourable decisions on costs made in respect of The Biowatch Trust (Biowatch), an environmental watchdog that sought information from governmental bodies with statutory responsibilities for overseeing genetic modification of organic material. The first decision related to a dispute between Biowatch and the governmental bodies. The High Court held that the Registrar for Genetic Resources (the Registrar) had been in default of his responsibilities in a number of respects, and made several orders in Biowatch's favour. But, to mark its displeasure at what it regarded as inept requests for information, first by letter and then in the notice of motion, the High Court decided to make no costs order against the governmental bodies in Biowatch's favour.
3. The second costs decision concerned Monsanto SA (Pty) Ltd (Monsanto), the South African component of a multinational diversified biotechnology company involved in the research, development and sale of Genetically Modified Organisms (GMOs) in South Africa. Monsanto, together with two other producers of GMOs, was permitted to intervene in the litigation. The High Court held that Monsanto had been compelled by Biowatch's conduct to intervene in the litigation, more particularly to prevent Biowatch from having access to confidential information which Monsanto had supplied to the Registrar. Because of its displeasure at the lack of precision as to the information sought by Biowatch, the Court ordered Biowatch to pay Monsanto's costs.
4. The net result was that, although Biowatch had been largely successful in its claim against the government agencies, and even though it obtained information, whose release Monsanto had strongly opposed, it found itself in the position of having to

foot the bill for all its own costs, and in addition, to pay the costs incurred by Monsanto

5. A shockwave appears to have swept through the public interest law community. When Biowatch's application for leave to appeal was set down for hearing in this Court, three public interest non-governmental organisations (NGOs) applied for and were granted the status of amici to assist the Court. The Centre for Child Law and Lawyers for Human Rights presented joint argument dealing with the deleterious effect that negative costs orders would have on the capacity of public interest law bodies to initiate litigation in defence of constitutional rights. They contended that the effect would be particularly severe on bodies that were dependent on support from international donors. Aligning itself with these submissions, the Centre for Applied Legal Studies went on to emphasise the particular importance of facilitating public interest litigation to protect environmental rights.

Does the case raise a constitutional issue?

6. This judgment does not deal with costs orders in general, but only with the proper approach to costs awards in constitutional litigation. The cases cited at the hearing showed that although when dealing with costs this Court has frequently referred to the need to take account of the constitutional dimension of a case, it has tended to do so on a rather ad hoc, case-by-case manner. The need for flexibility and a careful case-by-case approach was in fact emphasised in one of the first cases heard by this Court, *Ferreira v Levin*. In a judgment on costs given separately from the judgment on the merits, Ackermann J pointed out that the courts have over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general principle, have his or her costs.

8. He went on to explain that—

"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 the 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." (Footnotes omitted.)

9. During the thirteen years that have passed since *Ferreira v Levin* was decided we have indeed gained considerable experience of costs awards made on a case-by-case basis. A number of signposts have emerged. Without departing from the general principle that a court's discretion should not be straitjacketed by inflexible rules, it is now both possible and desirable, at least, to develop some general points of departure with regard to costs in constitutional litigation. More specifically, it is necessary to attempt to delineate the proper starting point for deciding costs in a case involving constitutionally protected rights to information and environmental justice.
10. The award of costs in a constitutional matter itself raises a constitutional issue and therefore this Court has jurisdiction to hear it.

Is it in the interests of justice for the matter to be heard?

11. Section 21A of the Supreme Court Act provides that appeals solely on costs should only be entertained in exceptional circumstances. Counsel for Monsanto contended that since no exceptional circumstances existed in the present matter, this Court should not entertain the application for leave to appeal. Counsel for Biowatch responded that section 21A of the Supreme Court Act was not binding on this Court. This response is correct. Nevertheless, the principle underlying the section is manifestly meritorious. Appeals on this limited, subsidiary issue pile costs upon costs, favouring litigants with deep pockets. They may usurp valuable appellate court time on ancillary questions that have no importance for the general public, and be of interest only to the litigants. In short, they are a side-show to the real issues that should occupy the court's time (although as the facts of this case indicate, they can be an important side-show). Thus, although an appeal to this Court on a costs award only may be competent even if no exceptional circumstances exist, it will not normally be in the interests of justice for leave to appeal to be granted.

12. In my view, the present case raises matters of special constitutional concern. The amici contend forcefully that if the approach suggested by the High Court is allowed to stand, public interest litigation could be jeopardised by the severe financial penalty that costs orders would impose on the organisations bringing these suits. Many civil society groups seeking constitutional justice are heavily dependent on funds from donors. The amici submitted that donors would be reluctant to provide financial support for litigation if they feared that the money would be swallowed up in satisfying adverse costs orders. Whether or not this argument is legitimate, the practical implications of the High Court decisions on costs in this case are undoubtedly wide-ranging. A question of general importance arises, namely whether the general principles developed by the courts with regard to costs awards need to be modified to meet the exigencies of constitutional litigation. The answer to this question has a direct bearing on the correct approach to the issues at the heart of this matter.
13. I accordingly conclude that it is in the interests of justice for leave to appeal to be granted.

The issues

14. This case raises four issues concerning costs awards in constitutional litigation. They are:

    (a) whether costs awards in constitutional litigation should be determined by the status of the parties or by the issue ;

    (b) what the general approach should be in relation to suits between private parties and the state;

    (c) what the general approach should be in constitutional litigation where the state is sued for a failure to fulfil its constitutional and statutory responsibilities for regulating competing claims between private parties; and

    (d) the role of appellate courts in appeals against costs awards.

Whether costs awards in constitutional litigation should be determined by status or by issue

15. The applicant’s argument to some extent, and the submissions of the amici heavily, emphasised the role of public interest advocacy groups in promoting constitutional litigation. The arguments underlined the ruinous effects that adverse costs orders could have on the capacity of these bodies to exist and do their work. The contention was 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. Monsanto’s response was precisely the converse, namely, that Biowatch had inserted itself into a matter in which it had no direct interest of its own, and accordingly had to bear the consequences of its inappropriate involvement.
16. In my view, it is not correct to begin the enquiry by a characterisation of the parties. Rather, the starting point should be the nature of the issues. Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well-endowed or indigent or, as in the case of many NGOs, reliant on external funding. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.
17. Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. No party to court proceedings should be endowed with either an enhanced or a diminished status compared to any other. It is true that our Constitution is a transformative one based on the understanding that there is a great deal of systemic unfairness in our society. This could be an important, even decisive factor to be taken into account in determining the actual substantive merits of the litigation. It has no bearing, however, on the entitlement of all litigants to be accorded equal status when asserting their rights in a court of law. Courts are obligated to be impartial with regard to litigants who appear before them. Thus, 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, advantaged or disadvantaged, they are asserting rights protected by the Constitution.
18. Thus in *Affordable Medicines* this Court stated that the ability to finance the litigation was not a relevant consideration in making a costs order. It held that the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay

costs to the state should not be departed from simply because of a perceived ability of the unsuccessful litigant to pay. It accordingly overturned the High Court's order of costs against a relatively well-off medical practitioners' trust that had launched unsuccessful proceedings. Conversely, 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.

19. This is not to deny that vulnerable sectors of society are particularly dependent on the support they can get from public interest groups. A perusal of the law reports shows how vital the participation of public interest groups has been to the development of this Court's jurisprudence. Interventions by public interests groups have led to important decisions concerning the rights of the homeless, refugees, prisoners on death row, prisoners generally, prisoners imprisoned for civil debt and the landless. There has also been pioneering litigation brought by groups concerned with gender equality, the rights of the child, cases concerned with upholding the constitutional rights of gay men and lesbian women, and in relation to freedom of expression. Similarly, the protection of environmental rights will not only depend on the diligence of public officials, but on the existence of a lively civil society willing to litigate in the public interest. This is expressly adverted to by the National Environmental Management (NEMA) which provides that a court may decide not to award costs against unsuccessful litigants who are acting in the public interest or to protect the environment and who had made due efforts to use other means for obtaining the relief sought.

20. Nevertheless, even allowing for the invaluable role played by public interest groups in our constitutional democracy, courts should not use costs awards to indicate their approval or disapproval of the specific work done by or on behalf of particular parties claiming their constitutional rights. It bears repeating that what matters is not the nature of the parties or the causes they advance but the character of the litigation and their conduct in pursuit of it. This means paying due regard to whether it has been undertaken to assert constitutional rights and whether there has been impropriety in the manner in which the litigation has been undertaken. Thus, a party seeking to protect its rights should not be treated unfavourably as a litigant simply because it is

armed with a large litigation war-chest, or asserting commercial, property or privacy rights against poor people or the state. At the same time, public interest groups should not be tempted to lower their ethical or professional standards in pursuit of a cause. As the judicial oath of office affirms, judges must administer justice to all alike, without fear, favour or prejudice.

What the general approach should be in relation to suits between private parties and the state

21. In *Affordable Medicines* this Court held that as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs. In that matter a body representing medical practitioners challenged certain aspects of a licensing scheme introduced by the government to control the dispensing of medicines. Ngcobo J said the following:

    "The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. 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 constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and the circumstances of the case. In *Motsepe v Commissioner for Inland Revenue* this Court articulated the rule as follows:

    '[O]ne should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the State, particularly, where the constitutionality of the 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 interest of the administration of justice nor fair to those who are forced to oppose such attacks.'" (Footnotes omitted.)

22. In *Affordable Medicines* the general rule was applied so as to overturn a costs award that had been given in the High Court against the applicants, the High Court having reasoned in part that the applicants had been largely unsuccessful and that they had appeared to be in a position to pay. Although Ngcobo J in substance rejected the appeal by the medical practitioners on the merits, he overturned the order on costs made by the High Court against them, and held that both in the High Court and in this Court each party should bear its own costs. 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.
23. The rationale for this general rule is three-fold. In the first place it 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. Secondly, constitutional 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. 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 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.

24. At the same time, however, the general approach of this Court to costs in litigation between private parties and the state, is not unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award. Nevertheless, for the reasons given above, courts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the state, where matters of genuine constitutional import arise. Similarly, particularly powerful reasons must exist for a court not to award costs against the state in favour of a private litigant who achieves substantial success in proceedings brought against it.
25. Merely labeling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough in itself to invoke the general rule as referred to in *Affordable Medicines*. The issues must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication. The converse is also true, namely, that when departing from the general rule a court should set out reasons that are carefully articulated and convincing. This would not only be of assistance to an appellate court, but would also enable the party concerned and other potential litigants to know exactly what had been done wrongly, and what should be avoided in the future.

What the general approach should be in constitutional litigation where the state is sued for a failure to fulfil its responsibilities for regulating competing claims between private parties

26. *Affordable Medicines* does not extend the general rule stated above to constitutional litigation between private parties. In *Barkhuizen*, a motorist pursuing a claim against a private insurance company sought to overturn decisions given against him in the High Court and the Supreme Court of Appeal, respectively. The issue was the enforceability of a provision in a standard-form contract that limited the period in which a claimant could institute proceedings against insurers who had repudiated

liability. The majority of the Court held that the appeal should be dismissed. On the question of costs, the majority judgment by Ngcobo J stated:

> "This is not a case where an order for costs should be made. The applicant has raised important constitutional issues relating to the proper approach to constitutional challenges to contractual terms. The determination of these issues is beneficial not only to the parties in this case but to all those who are involved in contractual relationships. In these circumstances justice and fairness require that the applicant should not be burdened with an order of costs. To order costs in the circumstances of this case may have a chilling effect on litigants who might wish to raise constitutional issues. I consider therefore that the parties should bear their own costs, both in this Court and the Courts below."

27. It should be mentioned that *Barkhuizen* is a relatively pure case of private parties being involved in constitutional litigation. Indeed, the voluntariness of the relationship between the parties was central to the dispute. By the nature of their subject matter, constitutional issues cannot be expected to arise frequently in cases where the state is not a party. But from time to time they will come to the fore. Thus in *Campus Law Clinic*, where a public interest NGO sought unsuccessfully to intervene in a dispute between a bank and a mortgagor, the Court did not award costs as asked for by the bank, because the Campus Law Clinic sought to raise important constitutional issues, albeit unsuccessfully.
28. Constitutional issues are far more likely to arise in suits where the state is required to perform a regulating role, in the public interest, between competing private parties. One thinks of licences, tender awards, and a whole range of issues where government has to balance different claims made by members of the public. Usually, there will be statutes or regulations which delineate the manner in which the governmental agencies involved must fulfil their responsibilities. In matters such as these a number of private parties might have opposite interests in the outcome of a dispute where a private party challenges the constitutionality of government action. The fact that more than one private party is involved in the proceedings does not mean, however, that the litigation should be characterised as being between the private parties. In essence the dispute turns on whether the governmental agencies have failed adequately to fulfil their constitutional and statutory responsibilities. Essentially, therefore, these matters

involve litigation between a private party and the state, with radiating impact on other private parties. In general terms costs awards in these matters should be governed by the over-arching principle of not discouraging the pursuit of constitutional claims, irrespective of the number of private parties seeking to support or oppose the state's posture in the litigation. As will be seen, this approach has significant implications for the disputed costs award between Monsanto and the applicant.

The role of appellate courts in appeals against costs awards.

29. It is clear that a court of first instance has a discretion to determine the costs order to be awarded in the light of the particular circumstances of the case, and that a court of appeal will require good reason to interfere with the exercise of this discretion. In dealing with an appeal against an award of security for costs under the Companies Act this Court in *Giddey* reaffirmed the ordinary rule that the approach of an appellate court to an appeal against the exercise of discretion by another court will depend upon the nature of the discretion concerned. Thus, where the discretion contemplates that the Court may choose from a range of options, the discretion would be discretion in the strict sense, and would not readily be departed from on appeal. O'Regan J explained that—

> "the ordinary approach on appeal to the exercise of the discretion in the strict sense is that the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law. Even where the discretion is not a discretion in the strict sense, there may still be considerations which would result in an appellate court only interfering in the exercise of such a discretion in the limited circumstances mentioned above."

30. Her judgment went on to hold that the court at first instance must consider all the relevant facts placed before it and then perform the required balancing exercise. It is best placed to make an assessment of the relevant facts and correct legal principles, and —

"it would not be appropriate for an appellate court to interfere with that decision as long it is it is judicially made, on the basis of the correct facts and legal principles. If the court takes into account irrelevant considerations or bases the exercise of its discretion on wrong legal principles, its judgment may be overturned on appeal. Beyond that, however, the decision of the court of first instance will be unassailable"

31. In *South African Broadcasting Corporation* the issue was whether this Court should uphold an appeal against a discretion exercised by the Supreme Court of Appeal not to allow cameras in court in a matter in which there was high public interest. In refusing to interfere with this discretion the majority judgment emphasised that the question was not whether this Court would have permitted radio and TV broadcasting of the appeal in the circumstances of the case. Rather it was whether the Supreme Court of Appeal did not act judicially in exercising its discretion, or based the exercise of that discretion on wrong principles of law, or misdirection on the material facts. The majority judgment went on to state with apparent approval);that Cloete J had formulated the test more crisply in *Bookworks*, the question being whether the court exercising the discretion had committed some "demonstrable blunder" or reached an "unjustifiable conclusion".

Applying these above considerations to this case

32. The question in this matter is whether, given the reasons advanced by the High Court for the decisions on costs, and in the light of all the considerations referred to above, the applicant has met the strict criteria required for appellate interference with the discretion exercised by the High Court.

[37] A fair reading of the judgment leaves one with no doubt that on both procedural and substantive issues the applicant achieved substantial success against the governmental agencies. 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. Similarly, although Monsanto succeeded in its principal objective, which was to prevent disclosure to Biowatch of information of a confidential character, it not only prolonged the litigation unnecessarily with its strongly

pursued and futile attempts to keep Biowatch out of court altogether on procedural grounds, but failed to stop Biowatch acquiring crucial information sought.

43. As stated above the general rule for an award of costs in constitutional litigation between a private party and the state is that if the private party is successful, it should have its costs paid by the state, and if unsuccessful, each party should pay its own costs. 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. In these circumstances the "misconduct" of Biowatch would need to have been of a compelling order indeed to justify a failure to award costs against the state. The reasons advanced by the High Court for making no award of costs do not, however, persuade.
44. 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. 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.

45. Constitutional issues were implicated in two ways. The applicant was pursuing information in terms of a right conferred by section 32 of the Constitution, and the information sought concerned environmental rights protected by section 24 of the Constitution. The government's duty was to act as impartial steward, and not to align itself either with those who had furnished the information or with parties seeking access to it. It was important that the objectivity not only be present, but be seen to be present in circumstances where the information related to questions of general public

interest and controversy, and there was no lawful ground to withhold it. This required objectivity and distance in respect of any competing private interests that might be involved. The greater the public controversy, the more the need for transparency and for manifest fidelity to the principles of the Constitution, as ultimately given effect to by PAIA. The papers indicated that in other countries there had been direct physical intervention to prevent the production of GMOs and that considerable tension existed in this country between supporters and opponents of genetic modification of foodstuffs. In these circumstances rule of law considerations would require the government to be astute to act in a way which would encourage parties who have strong and diametrically opposed opinions to submit themselves to the regulated and rational balancing of interests provided for by the Constitution and PAIA.

46. The lack of precision in the pre-litigation requests for information could well have called for comment from the High Court. But in reality it appears to have had relatively little significance for the manner in which the case was ultimately determined. Biowatch achieved a substantial degree of success. The High Court itself did the balancing of interests which the governmental authorities should have undertaken in the first place. Whatever ineptitude there might have been in the manner in which the requests were framed fell far short of the kind of misconduct that would have justified the Court in refusing to follow the general rule, namely that, where an applicant succeeds substantially in a constitutional suit against the government, the government should pay the applicant's costs.

47. To my mind, the refusal of the High Court to order the government to pay the costs of the applicant was out of sync with its judgment on the merits. The application was largely successful. The government had obstinately refused to provide information which, it subsequently became clear, it was duty bound to supply. Then, instead of welcoming a judicial decision on questions of considerable public importance, the governmental bodies sought to frustrate the proceedings on purely technical grounds. In these circumstances the High Court erred in allowing lapses by Biowatch to negate the general rule that the government pay Biowatch's costs. And the majority in the Full Court erred in failing to uphold Biowatch's appeal against this refusal. The result is that the appeal to this Court must succeed, and the state must be ordered to pay Biowatch's costs in the High Court.

Costs in favour of Monsanto

53. The evidence indicates that Biowatch and Monsanto have been at conflict over these issues for a number of years. This undoubtedly entered into the manner in which the case was litigated. Yet the dispute before the High Court was not one between Biowatch and Monsanto. The case was between Biowatch and the state. It turned on the responsibilities of the state to make information given to it by Monsanto and other parties available to Biowatch. Thus, as far as this particular matter is concerned, the litigation was not about a dispute between Biowatch and Monsanto. The extra-curial battles between Biowatch and Monsanto crystallised in this case in the context of the state's responsibilities to provide information about GMO experimentation. It was the state's duty to grasp the nettle and draw an appropriate line between information to be disclosed and information to be withheld. Its failure to make any initial determination provoked the litigation. Then once the litigation commenced, Monsanto was fully entitled to join the proceedings in order to protect information furnished by it that fell within the appropriate categories of confidentiality. Thus, Monsanto joined the matter not because of any mischievous, frivolous, or constitutionally inappropriate conduct on the part of the applicant – the fact that it was vexed by Biowatch's application did not mean that the application was vexatious –it entered the forensic fray because the governmental authorities had failed to exercise their constitutional and statutory obligations to separate the confidential wheat from the non-confidential chaff.
54. It might well be that given the regulatory role of the government bodies and their failure to deal from the outset with the question of confidentiality, a costs award requiring the state to bear the costs of both Biowatch and Monsanto might have been justified. This issue was not raised by Monsanto, however, and need not be pursued. For present purposes what matters is that this case did not truly involve litigation between private parties. It was litigation in which private parties with competing interests were involved, not to settle a legal dispute between themselves, but in relation to determining whether the state had appropriately shouldered its constitutional and statutory responsibilities.
55. In this respect the case resembled *Walele*, where the applicant sought to review a decision of a municipality to approve building plans. The effect of Mr Walele's successful review was that the decision was set aside and referred back, which affected the rights of the citizens that sought the approval of the building plans. The controversy in that case had started with a dispute between private parties. Yet as the

body responsible for dealing with the proposed plans and the objections made to them, it was the City Council that was made to pay the costs.

56. I conclude, then, that the general point of departure in a matter where the state is shown to have failed to fulfill its constitutional and statutory obligations, and where different private parties are affected, should be as follows: the state should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door - at the end of the day, it was the state that had control over its conduct.
57. In the present case the High Court misdirected itself in respect of the factors it was obliged to consider when it held that the applicants should pay costs in favour of Monsanto. In its curt appraisal of costs, the High Court did not take appropriate account of the fact that the litigation was essentially constitutional in nature. Nor did it deal adequately with the fact that it was the state's conduct that had provoked the litigation in the first place. Nor did it take account of the fact that its order afforded Biowatch crucial information whose release Monsanto had resolutely opposed.
58. This Court is accordingly at large to review the costs award in favour of Monsanto and come to its own conclusion. In doing so I will give due acknowledgement to the fact that the High Court was extremely troubled by the lack of precision in the claims made by Biowatch. At the same time, it is necessary to bear in mind that this was fresh constitutional terrain for all. The litigation commenced before the PAIA came into force, and all the parties had to feel their way. In addition, all the factors which have already been referred to in the discussion on the failure of the High Court to order the state to pay Biowatch's costs, are relevant to the appraisal of the correctness of the order that Biowatch pay Monsanto's costs. Taking all these considerations into account, the costs award in favour of Monsanto is unsustainable. No order at all should have been made between the two private parties involved in the matter.
59. By the same token, even though it wrongly sought costs against Biowatch in the High Court, and then tenaciously defended the costs award made in its favour in the Full Court and in this Court, Monsanto should not be ordered to pay Biowatch's costs in any of the Courts. The key factor once again is that it was the failure of the state functionaries to fulfill their constitutional and statutory responsibilities that spawned the litigation and obliged both parties to come to court.

Conclusion

60. The form of Biowatch's request for information did not justify the two decisions on costs made by the High Court. The High Court could have shown its disapproval in less drastic ways. The manner it chose was demonstrably inappropriate on the facts, and unduly chilling to constitutional litigation in its consequences. The appeal must be upheld and the governmental authorities must be ordered to pay the costs incurred by Biowatch in the High Court and in this Court. Furthermore, the order of the High Court requiring the applicant to pay Monsanto's costs must be set aside. There should be no costs order made in respect of the participation by Monsanto.