

Call for free public interest litigation

UP centre joins bid as friend in Concourt

ZELDA VENTER
HIGH COURT REPORTER

Litigants who act in the public interest in raising constitutional issues do not do so in their own commercial or personal interest – they do so on behalf of the public and the courts should thus be loath to award costs orders against them.

This is part of the argument the Centre for Child Law at the University of Pretoria proposed to present to the Constitutional Court if it succeeds in its bid to join as *amicus curiae* (friend of the court) the proceedings before the court next month.

They side with non-government organisation Biowatch, which on February 17 will appeal the costs order earlier granted against it by the Pretoria High Court.

Biowatch was slapped with a costs order to pay the costs of Monsanto South Africa Pty Ltd, a local component of the world's largest genetically modified (GM) seed company.

The costs order followed a court application from Biowatch for access to information that would shed light on decision making about the permitting of GM crop applications.

In February 2005 Acting Judge Eric Dunn ordered that Biowatch South Africa be granted access to almost all the information it required. He reaffirmed Biowatch

had a constitutional right to this information and that the information was in the public interest.

The judge, however, in a turn of events ordered Biowatch to pay the legal costs.

Biowatch unsuccessfully appealed the costs order to a full Bench of three judges, but it was given a lifeline to approach the Constitutional Court as one of the judges agreed that the costs order should be reversed.

The Centre for Child Law and Lawyers for Human Rights, who both do public interest work, want to join the proceedings as they say an adverse costs order can be disastrous for an individual or organisation subjected to it.

They say it might in some instances mean the end of the organisation in question.

Carina du Toit of the Centre for Child Law said in a statement filed at the Constitutional Court the issue of costs being awarded against public interest litigants was a matter of intense interest and concern to the centre, as it had a direct bearing on its work.

She said prior to the outcome of the Biowatch case, there was much less of a concern about the risk of an adverse cost order.

The centre, a non-profit organisation, regularly litigates on behalf of children or cases involving children.

Du Toit said public interest litigants should be given special protection in relation to adverse

costs awards, provided that the litigation was neither frivolous nor vexatious.

The centre has acted for children in the residential care system, in the criminal justice system, those whose socio economic rights were not met and children in the mental health system.

Du Toit said the risk of a cost order was a very live issue for the centre in its work and should the majority decision of the full Bench stand, the future litigation strategy of the centre would be affected.

She said the core of the centre and LHR's submissions would be that costs must only on rare occasions be awarded against litigants seeking to enforce constitutional rights and then with great circumspection due to the potential chilling effect that would otherwise result.

It will be argued that public interest litigants ought to be given special protection in relation to adverse costs awards.

It will be further argued that the need to avoid discouraging public interest litigation against private individuals is particularly important in the context of the right of access to information.

If public interest litigants shied away from seeking such information because of the dangers of such costs orders, this would severely undermine the effectiveness of the Constitution and the Promotion of Access to Information Act.