IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 23005/2002

In the matter between:

THE TRUSTEES FOR THE TIME BEING OF THE BIOWATCH TRUST	Applicant
and	
THE REGISTRAR: GENETIC RESOURCES	First Respondent
THE EXECUTIVE COUNCIL FOR GENETICALLY MODIFIED ORGANISMS	Second Respondent
THE MINISTER FOR AGRICULTURE	Third Respondent
MONSANTO SOUTH AFRICA (PTY) LTD	Fourth Respondent
STONEVILLE PEDIGREED SEED COMPANY	Fifth Respondent
D&PL SA SOUTH AFRICA INC	Sixth Respondent
THE OPEN DEMOCRACY ADVICE CENTRE	Amicus Curiae

JUDGEMENT

DUNN, AJ:

INTRODUCTION

[1] The present proceedings concern an application by the trustees of the Biowatch Trust ("*Biowatch*") for access to information held by the first respondent, i.e. the Registrar: Genetic Resources ("*the Registrar*"), and the second respondent, i.e. the Executive Council for Genetically Modified Organisms (*"the Council"*), relating to Genetically Modified Organisms ("*GMOs*").

[2] Biowatch relies on a trilogy of statutory enactments to enforce its claims for access to such information, namely the Genetically Modified Organisms Act, 1997 (Act No 15 of 1997) ("*the GMO Act*")[1], the National Environmental Management Act, 1998 (Act No 107 of 1998) ("*NEMA*"), as well as section 32 of the Constitution of the Republic of South Africa Act, 1996 (Act No 108 of 1996) ("*the Constitution*").

[3] Biowatch - as its full name denotes - is a trust. It was registered as such in 1999. According to the deed of trust[2], Biowatch's primary object is to engage in and promote ***"nature conservation activities".***[3]

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[1] Certain regulations promulgated under the GMO Act are also relied upon.

[2] Deed of Trust (Annexure "EPS3"), pp 46 – 67.

[3] Annexure EPS3 (Deed of Trust): clause 5, p 53. The expression "***nature conservation activities"*** is defined to mean ***"... activities promoting nature conservation...***" (clause 2.3.7, p 49) and includes:

"***... monitoring the use, control and release of genetically modified organisms in South Africa, including:***

2.3.7.2.1 ***The social, economic and environmental impacts of releases;***

2.3.7.2.2 ***The activities of domestic and foreign bio technology companies and the implementation of the national legislation and policy including Genetically Modified Organisms Act, No 15 of 1997 and deliberations of its Executive Council and Advisory Committee" (clause 2.3.7.2, p 50).***

[4] The first respondent has already been identified, i.e. the Registrar. He was appointed under section 8 of the GMO Act and, in terms of section 8(2) thereof, he is charged with the administration of the GMO Act and exercises such powers and functions that may be assigned to him under the GMO Act by the Council.

[5] The second respondent has also been identified, i.e. the Council, which was established under section 3 of the GMO Act. In terms of section 4 of the GMO Act the Council is to advise the Registrar on all aspects concerning the development, production, use, application and release of GMO's, and to ensure that all activities with regard to the development, production, use, application and release of GMO's are performed in accordance with the provisions of the GMO Act.

[6] The third respondent is the Minister of Agriculture, duly appointed as such in terms of section 91 of the Constitution.

[7] The fourth respondent is Monsanto South Africa (Pty) Ltd (*"Monsanto*"), a diversified biotechnology company which is involved in, among other things, the research, development and sale of GMO's in South Africa.

[8] The fifth respondent is Stoneville Pedigreed Seed Company (*"Stoneville"*), with its head office in Memphis, Tennessee. It has since changed its name to Emergent Genetics USA, Inc. It has conducted

business in South Africa since 1990 and has conducted trials of genetically modified cotton plants since 1993 or 1994.

[9] The sixth respondent is D&PL South Africa (*"D&PL SA")*, a company registered and incorporated in terms of the company laws of the State of Delaware, United States of America. D&PL SA has for a number of years produced and supplied both conventional (i.e. non-genetically modified seed) as well as a GMO seed in South Africa.

[10] At the commencement of the hearing there was some uncertainty as to whether or not Stoneville and D&PL SA had been granted leave to intervene in this application. There was no official endorsement on the court file to show that such leave had been granted to either of them. They had in any event filed comprehensive answering affidavits and there was no objection to their intervention in these proceedings. Consequently, and in order to formalise matters, I granted an order authorising, to the extent necessary, their intervention in these proceedings.

[11] The Open Democracy Advice Centre (*"ODAC")* sought leave to intervene in the proceedings as an *amicus curiae*. ODAC is a non-governmental non-profit company registered in terms of section 21 of the Companies Act, 1973 (Act No 61 of 1973). It is an association between the Institute for Democracy in South Africa, the Black Sash Trust and the Department of Public Law of the University of Cape

Town. Its primary mission is to promote transparent democracy and foster a culture of corporate and government accountability. It seeks to achieve its objectives through supporting the effective implementation and protection of rights and laws which enable access to and disclosure of information. As a proper case had been made out by ODAC for its intervention in these proceedings and since none of the other parties offered any objection thereto, I condoned its failure to comply with the provisions and time periods set out in Rule 16A of the Uniform Rules of Court and granted it leave to intervene and to present oral argument at the hearing.

ISSUES RAISED *IN LIMINE*

[12] The Registrar deposed to an answering affidavit on behalf of the first three respondents. In that answering affidavit the Registrar essentially raises five points *in limine*. First, it is contended that the Promotion of Access to Information Act, 2000 (Act No 2 of 2000) (*"PAIA"*) is applicable to Biowatch's request(s) for the information that it seeks, that it failed to exhaust the internal appeal procedure before instituting these proceedings and that the present application is therefore premature[4]; second, that Biowatch failed to comply with the procedural requirements set out in PAIA and that it therefore failed to make out a

4 Section 78(1) of PAIA.

prima facie case for the relief claimed by it; third, that the Minister was misjoined because she[5]:

> ***"... only comes into the picture when the matter is referred to the Appeal Board to reconsider the decision of the Registrar and the Council...*** [and because Biowatch had not alleged in its papers that it complied with this requirement]***... it is improper to join the Minister in these proceedings"*** ([my insertion]);

fourth, because NEMA is administered by the Department of Environmental Affairs and Tourism the non-joinder of its Minister has rendered any claim for relief based on that Act incompetent[6]; and, fifth, that third parties such as Monsanto should have been given notice of these proceedings[7]

[13] As matters turned out only one point *in limine* remained that was persisted with by Mr MM Rip, SC, who appeared with Ms Makhubele for the first to third respondents. The remaining point *in limine* that was persisted with relates to the non-joinder of the Minister of Environmental Affairs and Tourism.

[14] The points *in limine* concerning the non-compliance with the internal appeal procedure and the other procedural requirements of PAIA were dealt with as part of the merits of this matter. Those issues are dealt with more fully hereunder. As far as the remaining point *in limine* is

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[5] The current Minister of Agriculture and Land Affairs is a woman, *viz*., the honourable Ms Angela Thokozile Didiza.

[6] Registrar: Paras 5 - 12, pp 203 - 207.

[7] Registrar: Paras 14 - 15, pp 207 - 208.

concerned, *viz* the non-joinder of the Minister of Environmental Affairs and Tourism, Mr Rip submitted that the latter had a direct and substantial interest in these proceedings. Two reasons were advanced to support this submission. First, it was argued that, since Biowatch seeks to enforce the provisions of NEMA, which statute is administered by the Department of Environmental Affairs and Tourism, the ministerial head of that department of necessity has a direct and substantial interest in these proceedings. Second, it was argued that since Biowatch, as a non-governmental organisation seeking to assert its position in a field or industry of which the latter department is the official watchdog, its ministerial head would be in a better position to say whether or not Biowatch is truly acting in the public interest as it claims. I am not persuaded by these arguments. If Mr Rip's submissions were to be correct, it would mean that any applicant for information requested under PAIA, would have to cite the Minister of Justice and Constitutional Development on each occasion that PAIA is invoked against the information officer of any another government department for access to information in the possession of such other department – and this simply on the basis that the administration of PAIA has been assigned to the Minister of Justice and Constitutional Development. By merely stating this proposition, the flawed reasoning on which it is premised becomes obvious. The second ground advanced is equally without merit. If the first to third respondents had any doubt about Biowatch's claim that it acts in the public interest, they had more than ample opportunity to investigate this issue and deal with it in the answering affidavit deposed to by the Registrar. If needs be, they could even have obtained an affidavit from an official in the Department of Environmental Affairs and Tourism to refute Biowatch's assertions in this regard.

[15] In consequence the sole remaining point *in limine* must fail. Only a few minutes were spent in addressing this point. The costs relating thereto are nominal and should form part of the overall costs order made herein.

THE SALIENT FACTS

[16] In Biowatch's founding affidavit its project manager, Ms Pschorn-Strauss (*"Pschorn-Strauss"*), outlines certain issues and concerns arising from the use, control and release of GMO's in South Africa. She explains that genetic engineering is a process that is used to modify life forms by introducing molecular material from other life forms in order to alter the genetic make-up and inheritable qualities of the modified life form permanently. This is accomplished by the introduction of DNA[8]. The DNA thus introduced need not be from the same type of organism. It can be from a completely unrelated organism which results in the formation of transgenic organisms. For example, genes from a virus or bacteria, or from an animal, can be inserted into a plant. The modified life form resulting from this is known as a genetically modified organism or, by its acronym, GMO.

[17] Pschorn-Strauss provides a number of examples that has arisen from experimentation with GMO's. The one example cited by her relates to the genetic pollution of certain native maize landraces (i.e. ancient cultivated varieties of maize plants). It is stated that such contamination is irreversible and presents a serious threat to the

[8] This is an acronym for deoxyribonucleic acid.

genetic integrity of the crop. Another example referred to by Pschorn-Strauss pertains to the discovery of a genetically modified maize in the human food supply in the United States of America. The genetically modified maize in question contained a certain chemical (Cry9C), which is an insecticidal protein specifically introduced by genetic engineering with the objective of making the maize resistant to attack by certain insects. The genetically modified maize had not yet been approved for human consumption, because insufficient research had been conducted into the effect of the chemical referred to. The examples referred to by Pschorn-Strauss are not seriously challenged by any of respondents. The Registrar, on behalf of the first to third respondents, merely contends that such evidence is of a scientific nature which has no bearing on the request to access to information. Monsanto, on the other hand simply denies that there have been, what is referred to as, ***"…disastrously harmful experiments with, and releases of, GMO's"***. At best this is a bold denial and does not really detract from the point that Pschorn-Strauss seeks to drive home, namely that GMO technology is unpredictable and that public health and environmental safety issues arise from the use, control and release of GMO's. Furthermore, it is not disputed by any the respondents that potential dangers exist in GMO experimentation. This could hardly have been disputed since Parliament itself has recognised that statutory intervention is required for the proper governance of matters pertaining to GMO's - hence its enactment of the GMO Act[9].

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[9] From the long title to the GMO Act it is evident that the objects thereof are, among other things, to "***...ensure that all activities involving the use of genetically modified organisms... shall be carried out in such a way as to limit possible harmful consequences to the environment; to give attention to the prevention of accidents and the effective management of waste; to establish common measures for the evaluation and reduction of the potential risks out of activities involving the use of genetically modified organisms; to lay down necessary***

[18] Against this background Biowatch on four occasions between 17 July 2000 and 26 February 2001 requested certain information from the Registrar pertaining to matters relating to the use of GMO's in South Africa. It might not immediately be so evident, but it should be emphasised that Biowatch's requests for information were made between the promulgation of PAIA on 2 February 2000[10], and the date upon which it came into operation, *viz.*, 9 March 2001[11].

[19] Biowatch's request for information during this period ("*the hiatus period*") were made on the following dates, namely -

(a) on 19 July 2000 Pschorn-Strauss wrote to the Registrar and requested a list of licences granted for GMO field trials, she further enquired whether the Registrar had any information on the location of those field trials and, finally, she wanted to know whether any Bt maize had been released ("*Biowatch's first request*")[12];

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requirements and criteria for risk assessments ... to establish appropriate procedures for the notification of specific activities involving the use of genetically modified organisms; and to provide for matters connected therewith".

10 This is the date on which PAIA was assented to by the President.

11 PAIA took effect on this date by virtue of a determination by the President by proclamation in the Gazette, i.e. Proclamation R20 in Government Gazette 22125 of 9 March 2001.

12 Biowatch's first request (annexure "EPS8(1)"), p 152.

(b) on 23 August 2000 Ms Christene Jardine ("*Jardine*"), a representative of Biowatch, sent a fax to the Registrar (*"Biowatch's second request"*)[13]. This fax reads as follows:

> ***"Access to risk assessment data accompanying requests for trial and commercial release of genetically modified organisms***
>
> > ***I refer to the telephonic discussion of 22 August 2000. Further to that discussion, I would like to state the following:***
> >
> > ***Biowatch are a national NGO dedicated to the implementation and monitoring of the Convention on Biological Diversity within South Africa. Biowatch is concerned that genetically modified organisms may pose a threat to the environment, particularly to biodiversity, and is committed to ensuring that the right of all South Africans to an environment that is not harmful to their health and well-being is respected, protected, promoted and fulfilled. I have been employed by Biowatch to evaluate the risk assessment referred to above.***
> >
> > ***There has been much debate about, and criticism levelled against, the adequacy of the risk assessments, and concern that they may not deal realistically or adequately with ecological risks. Releases of genetically modified organisms, based on permits issued as a result of inadequate risk assessment, may place our biodiversity under threat. In order to move this debate forward into a more substantive form, it is necessary to study and evaluate the risk assessments carried out to date, and to find out what they do and do not assess. Only in this way will it be possible to identify the inadequacies, if any, and make recommendations to improve the value and the focus of the risk assessments that will be carried out in future.***

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[13] Biowatch's second request (annexure "EPS8(2)"), pp 153 - 154.

> ***I am planning to be in Johannesburg on 18 and 19 September, and would be grateful if I could spend those two days going through a selection of the risk assessments, and in addition specifically those that are associated with the following Conditional General Releases: 1996 Monsanto Bt Cotton; March 1997 Monsanto Bt Maize; September 1997 PHI Bt Maize; August 1998 AgrEvo Glufosinate Resistant Oilseed Rape, Maize, Soyabean. I would like to browse through a few of the risk assessments for field trials, and also some of those for Commodity Import - animal consumption (November 1999 Cargill RR Soyabean; March 1999 AFMA RR maize).***
>
> ***I am aware that one or a few pages of each application will be Business in Confidence, and I will obviously comply with confidentiality requirements by signing an agreement to this effect.***
>
> ***I would appreciate your earliest response, as I need to arrange my flights to, and onward connections from, Johannesburg".***

In essence Biowatch's second request was for Jardine to have access to a selection of risk assessments in order to determine the adequacy thereof in relation to certain licences that had been granted;

(c) on 19 October 2000 Ms Mariam Mayet ("*Mayet*"), Biowatch's legal consultant, sent an electronic mail to the Registrar("*Bio Watch's third request*")[14] in which she requested access to the following information, namely:

[14] Biowatch's third request (annexure "EPS8(5)"), pp 158-159.

* Under which legislation field trial licences had been granted prior to the GMO Act coming into operation;

* an update of all licences that had been granted since the GMO Act came into operation;

* submission for Biowatch (per Mayet) to inspect the licences, as well as any other form of authority, granted during the period 1998 to October 2000, as well as permission to inspect the records regarding compliance with public participation provisions under the GMO Act;

* details of all pending applications pertaining to GMO's; and

* the exact co-ordinates of field trials and crops that had been approved for commercial release; and

(d) on 26 February 2001 Biowatch's Cape Town attorneys, Messrs Winstanley Smith & Cullinan (*"WSC")*, sent a fax to the Registrar("*Biowatch's fourth request*")[15] in which they, among other things, pointed out that Biowatch is entitled to all the information listed in a schedule to their fax in terms of section

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15 Biowatch's fourth request (annexure "ESP9"); pp 179-184.

32(1)(a) of the Constitution. Biowatch's attorneys requested the Registrar to furnish the information listed in the said schedule by no later than the close of business on Friday, 9 March 200<u>0</u>[16]. The schedule attached to WSC's fax of 26 February 2001 comprises eleven items of information. These will be reverted to in more detail hereunder.

[20] Biowatch complains that the Registrar did not substantively respond to its first request. Biowatch's second request, dated 23 August 2000, was belatedly responded to on or about 26 October 2000, i.e. after both Mayet and Pschorn-Strauss had communicated with him about a response to that request. In the Registrar's written response[17], he furnished a list of all GMO permits that had been issued since 1 December 1999, i.e. the date on which the GMO Act came into force. However, access to the risk assessment data referred to in Biowatch's second request was refused on the basis of the prohibition contained in section 18(1) of the GMO Act[18], i.e. unless he was authorised to

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16 The year referred to, i.e. 200**<u>0</u>**, is self-evidently incorrect since the fax itself is dated 26 March 200**<u>1</u>**.

17 Registrar's letter dd 26 October 2000 (annexure "EPS8(4)"), pp 156 - 157

18 Section 18 of the GMO Act reads as follows:

"***(1) No person shall disclose any information acquired by him or her through the exercise of his or her powers or the performance of his or her duties in terms of this Act, except—***

(a) in so far as it is necessary for the proper application of the provisions of this Act;

(b) for the purposes of any legal proceedings under this Act;

(c) when ordered to do so by any competent court; or

(d) if he or she is authorised to do so by the Minister.

(2) The Council shall decide, after consultation with the applicant, which information will be kept confidential and shall inform the applicant of its decision: Provided that the following information shall not be kept confidential—

grant such access by the Council at its next meeting. There are three features of the Registrar's aforesaid response that need to be mentioned. First, Biowatch's second request made no mention of a list of GMO permits. It therefore seems as if the list of GMO permits was furnished to Biowatch in response to its first request[19]. But, if the Registrar's aforesaid response was also intended to constitute an answer to Biowatch's first request, it provided no information in respect of the location of field trials and it also did not address the question whether any Bt maize had been commercially released. Third, unless the Council instructed the Registrar to grant Biowatch access to the risk assessments, its request to inspect those records was to remain pending.

[21] Biowatch's third request[20] was promptly responded to by the Registrar within a matter of days[21]. An analysis of Biowatch's third request and

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(a) ***the description of the genetically modified organisms, the name and address of the applicant, and the purpose of the contained use or release and the location of use;***
(b) ***the methods and plans for the monitoring of the genetically modified organisms and for emergency measures in the case of an accident; and***
(c) ***the evaluation of foreseeable impacts, in particular any pathogenic or ecologically disruptive impacts.***
(3) ***Notwithstanding the provisions of subsection (2), the Council may after consultation with the applicant and if the Council is satisfied on the grounds of information furnished by the applicant that certain information should be withheld in order to protect the intellectual property of the applicant, withhold such information for the period needed to protect such rights.***
(4) ***If, for whatever reasons, the applicant withdraws an application, any party who has knowledge of the details of the application must respect the confidentiality of the information supplied."***

[19] Biowatch's first request (annexure "EPS8(1)"), p 152.

[20] Biowatch's third request (annexure "EPS8(5)"), pp 158 - 159.

[21] Registrar's letter dd 25 October 2000 (annexure "EPS8(6)"), pp 160 - 178.

the Registrar's response thereto reveals the extent to which the his response is deficient. These deficiencies are the following:

(a) In paragraph 3 of Biowatch's third request permission was sought for Mayet to inspect all licences or other forms of authorisation granted during the period 1998 to October 2000. This request was either ignored or overlooked;

(b) similarly, in paragraph 3 of Biowatch's third request, permission was sought to inspect records regarding compliance with the public participation provisions of the GMO Act from the date it came into force. This request was ignored. Instead, the Registrar enclosed four letters[22] containing comments by individual members of the public in connection with proposed field trials for GMO's. If one has regard to the list of permits attached to the Registrar's response[23], the inadequacy of the his response immediately becomes apparent;

(c) in paragraph 6 of Biowatch's third request information was sought about the exact co-ordinates of the field trials and commercial releases. The Registrar's response to this specific request was that, in order to prevent possible interference with

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22 Registrar's letter dd 26 October 2000 (annexure "EPS8(6)"), especially annexure "B" thereto, pp 171 - 175.

23 Registrar's letter dd 25 October 2000 (annexure "EPS8(6)"), especially annexure "A" thereto, pp 162 - 170.

GMO trials, he is not legally authorised to provide the exact co-ordinates of the field trials undertaken. Instead a list of towns or, possibly, districts in which the field trials were, or are being, undertaken was provided[24]; and

(d) in paragraph 7 of Biowatch's third request permission was sought for an inspection of the register regarding the registration of academic and research institutions. This request was ignored. Instead the Registrar provided a list of all academic and research facilities which, according to him, had been registered under the GMO Act in 2000[25].

[22] As far as Biowatch's fourth request is concerned, i.e. the request contained in WSC's letter of 26 February 2001, it is common cause that - apart from an acknowledgement of receipt thereof and a written notification that the Registrar would be seeking guidance from the Directorate of Legal Services - no further response was received from either the Registrar or the said Directorate.

[23] I mentioned earlier that the eleven items of information specified in Biowatch's fourth request would be reverted to. The items of information to which Biowatch requires access are the following:

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24 Registrar's letter dd 25 October 2000 (annexure "EPS8(6)"), especially annexure "C" thereto, p 176.

25 Registrar's letter dd 25 October 2000 (annexure "EPS8(6)"), especially annexure "D" thereto, p 177.

"Schedule:

Information held by the NDA to which Biowatch requires access

(i) ***All data relating to risk assessments accompanying requests for trial and commercial release of GMOs, including but not limited to, field trial risk assessments, commodity import-animal consumption risk assessments, and the following Conditional General Releases:***

- ***1996 Monsanto Bt Cotton;***
- ***March 1997 Monsanto Bt Maize;***
- ***September 1997 PHI Bt Maize; and***
- ***August 1998 AgrEvo Glufosinate Resistant Oilseed Rape, Maize and Soyabean.***

(ii) ***All data relating to RR Wheat.***

(iii) ***Copies of all applications for permits, approvals and other authorisations submitted in terms of the GMO Act and/or the regulations promulgated under it.***

(iv) ***Full details of all permits and/or approvals and/or other authorisations granted and all applications pending in respect of imports, exports, field trials and/or general releases. At the very least, the details furnished in this regard should comply with the requirements set out in section 18(2) of the GMO Act, namely:***

(a) ***the description of the GMO, the name and address of the applicant, and the purpose of the contained use or release and the location of use;***

(b) ***the methods and plans for the monitoring of the genetically modified organisms and for emergency measures in the case of an accident; and***

(c) ***the evaluation of foreseeable impacts, in particular any pathogenic or ecologically disruptive impacts.***

The list furnished as Annexure "A" to your abovementioned telefax to Ms Mayet dated 25 October 2000 clearly does not comply with these minimum requirements, particularly those outlined in paragraphs (b) and (c) above.

(v) ***Full details of public participation since the commencement of the GMO Act, including, but not limited to, the State's policy in regard to public participation and copies of all advertisements, notices and comments received in terms of Regulation 6 of the Regulations promulgated under the GMO Act.***

(vi) ***Details of the exact locations of the field trials and commercial releases (for reasons outlined in the letter to which this schedule is annexed, and are not entitled to withhold details of these locations).***

(vii) ***Full details of registered academic and research institutions for the years 1999 to 2001.***

(viii) ***Copies of the Minutes of all meetings of the Executive Council of Genetically Modified Organisms and the Advisory Committee to date.***

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

(x) ***Full details (including contact details) of all persons currently represented on the Advisory Committee, and confirmation that members of***

public sector have been appointed to the Committee.

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

[24] An array of defences have been raised against the relief claimed by Biowatch. These include: The applicability of the provisions of PAIA to this matter coupled with Biowatch's failure to comply with such provisions[26]; Biowatch's failure to exhaust the internal appeal remedy in PAIA; the alleged commercial confidentiality of the information sought by Biowatch, which information, according to the defence(s) raised, is not subject to disclosure for a variety of reasons; Biowatch's failure to properly articulate the information it seeks access to; and, lastly, the fact that an order for the mandatory furnishing of such information would not constitute *"appropriate relief*" within the contemplation of section 38 of the Constitution. I will deal with each of these defences in turn.

THE APPLICABILITY OF THE PROVISIONS OF PAIA AND BIOWATCH'S ALLEGED NON-COMPLIANCE THEREWITH

[25] All the respondents raised this as a defence to Biowatch's application. The Registrar contends that since the coming into operation of PAIA all aspects relating to the request and grant of information is governed by

[26] I refer to this particular defence in broad outline only, but there are a number of facets falling thereunder. These range from the fact that none of of Biowatch's requests for information were made under and in terms of the provisions of PAIA to the fact that Bio Watch's failed to follow the internal appeal procedure stipulated in PAIA.

PAIA[27]. The Registrar further contends that section 78 of PAIA defers all applications to a court of law until all internal remedies have been exhausted[28]. Monsanto adopts a similar approach. It contends that any right Biowatch might have had to access the information it seeks is now governed by PAIA[29]. Initially Monsanto also contended that, if it were to be found that PAIA is not applicable to these proceedings, Biowatch's right of access to information is still governed by item 23(2)(a) of Schedule 6 to the Constitution[30] however, Mr J Wilson, who appeared on behalf of Monsanto, correctly conceded - during the course of his thorough argument - that Item 23(2)(a) of Schedule 6 to the Constitution lapsed upon the enactment of PAIA and that, accordingly, the right of access to information during the hiatus period was governed by section 32(1)(a) of the Constitution in its unamended form. Monsanto further contended that the present proceedings are premature and should be dismissed in terms of section 78 of PAIA, because Biowatch failed to follow the internal appeal procedure provided for in PAIA[31]. Stoneville contends that the provisions of PAIA govern the information requested by Biowatch[32]. D&PL SA fully associated itself with this defence as well[33].

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[27] Registrar (answering affidavit): para 6.1, p 203.

[28] Registrar (answering affidavit): para 6.2, p 204.

[29] Green (answering affidavit): para 27, p 267.

[30] Green (answering affidavit): para 27, p 267.

[31] Green (answering affidavit): para 28, p267.

[32] Broodryk (answering affidavit): para's 8, 9.1 and 12.1, pp 381 - 382; and 18.2, pp 385 - 386.

[33] Olivier (answering affidavit): para 9, p 451.

[26] Mr M Chaskalson, who appeared on behalf of Stoneville, submitted that prior to the commencement of PAIA, Biowatch had no clear right to the information sought by it in view of the provisions of section 18 of the GMO Act and section 31(1)(c)(iii) and (v) of NEMA[34]. Counsel for Stoneville further submitted that since Biowatch had not challenged the constitutional validity of the relevant provisions of the GMO Act and NEMA, and because it had also not sought an order reviewing the Registrar's obvious refusal to grant access to the information sought, it followed that Biowatch had no clear right to such information[35].

[27] Mr J C Butler, who appeared on behalf of Biowatch, submitted that the argument in favour of the applicability of PAIA is essentially one relating to retrospectivity. The cardinal question therefore had to be whether PAIA applies to the requests for information that Biowatch had made prior to PAIA's provisions coming into effect. Quite obviously, if PAIA did apply retrospectively to requests that had already been made by Biowatch, it would have been obliged to follow the procedures set out therein. Mr Butler further submitted that there are five reasons why PAIA does not apply retrospectively. These reasons are the following[36]:

34 Stoneville's heads of argument: para 6.1.1, p 4.

35 Stoneville's heads of agrument: para's 6.1.2 and 6.1.3, pp 4 - 5

36 Biowatch's heads of argument: para's 59 - 60, pp 28 - 31.

(a) First, there is a common law presumption against the retrospective application of legislation[37]. In this regard Mr Butler argued that retrospectively applied legislation operates unfairly against persons; that it has a tendency to divest parties of rights that have accrued; and that it does not permit parties to arrange their affairs based upon the law as it stands at the time that they do so;

(b) second, the respondents' argument in favour of retrospectively is illogical and leads to absurd results. In this regard Mr Butler submitted that the provisions of PAIA and its regulations require a party who makes an application for information to follow certain procedures. However, at the time that Biowatch's requests for information were made they were entirely valid since they complied with the requirements of section 31 of NEMA and section 32 of the Constitution. Therefore if the provisions of PAIA were to be applied retrospectively, Biowatch's requests for information would become invalid solely on the ground that they were not in the prescribed format. This, Mr Butler submits, would lead to an absurd result. It would instantaneously render invalid and procedurally flawed requests that were, at the time they were made, perfectly validly;

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[37] Steyn, LC, **Die Uitleg van Wette,** 4th ed., at pp 86 *et seq*.

(c) third, the retrospective application of PAIA would also give result to another odd result. For example, if a request were to be made, and declined, prior to the commencement of PAIA, the requester for information could institute proceedings before PAIA comes into effect. If the state of litis contestatio were to be reached after PAIA comes into effect, the requester could still be divested of his or her rights if they failed to follow the procedure set out in PAIA in the event of it being applied retrospectively;

(d) fourth, the provisions of section 32 of the Constitution were designed to create and encourage access to information. If PAIA were to be applied retrospectively in a manner that denies access to information it would be at odds with the Constitution and would also not be in accordance with the constitutional objectives of PAIA; and

e) fifth, the legislature, in express and unequivocal terms, enjoined all courts of law to interpret legislation relating to environmental matters in such a way that the spirit, objects and principles of

section 2 of NEMA are given effect to[38]. Section 2 of NEMA has an express principle of openness and transparency, the objective of it being to give public the right of participation and knowledge. To interpret PAIA in the manner contended for by all the respondents is not in accordance with the provisions of especially section 2(1)(e) of NEMA and runs contrary to the spirit and purpose of both NEMA and PAIA.

[28] On behalf of the *amicus curiae* Ms J Cassette, who appeared with Mr T Masuku, submitted that PAIA should not be applied retrospectively unless there were clear indications to the contrary. In this regard Ms Cassette, contended that no clear legislative intent to the contrary can be evinced from the provisions of PAIA. In support of this argument she referred to section 9 of PAIA[39], where the objects of that Act are

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[38] Section 2(1) and (2) of NEMA reads as follows:

"***(1) The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and—***
(a) shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination;
(b) serve as the general framework within which environmental management and implementation plans must be formulated;
(c) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment;
(d) serve as principles by reference to which a conciliator appointed under this Act must make recommendations; and
(e) guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment.
(2) Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably "

[39] The germane portion of section 9 of PAIA reads as follows:

"***The objects of this Act are—***
……..

stated, among other things, to be the promotion of transparency and accountability. Ms Cassette submitted that this is underscored by the preamble to PAIA[40]. To apply the provisions of PAIA in the manner contended for by the Respondents, Ms Cassette submitted, would be to render any requests made by Biowatch void simply because they did not comply with PAIA at a time when it was not even in force .This effectively would nullify any exercise of a requester's (*in casu* Biowatch's) rights in terms of section 32 of the Constitution.

[29] It is not expressly stated in PAIA that its provisions operate retrospectively. In our law no statute is to be construed as having retrospective operation unless the legislature clearly intended it to have that effect[41]. Consequently, the type of retrospectivity contended for by

(d) ***to establish voluntary and mandatory mechanisms or procedures to give effect to that right in a manner which enables persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible; and***

(e) ***generally, to promote transparency, accountability and effective governance of all public and private bodies by, including, but not limited to, empowering and educating everyone—***

- ***(i)*** ***to understand their rights in terms of this Act in order to exercise their rights in relation to public and private bodies;***
- ***(ii)*** ***to understand the functions and operation of public bodies; and***
- ***(iii)*** ***to effectively scrutinise, and participate in, decision-making by public bodies that affects their rights.***"(my emphasis)

40 The germane portions of the preamble are:

"***AND IN ORDER TO—***

* ***foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information;***
* ***actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights,***"

41 ***National Director of Public Prosecutions, v Carolus and others***, 2000(1) SA 1127 (SCA) at para [31], pp 1137 I – 1138 D.

the respondents can be described as retrospectivity in the "***weak***" sense, as opposed to true retrospectivity, or so-called ***"strong***" retrospectivity, which denotes that a statute is to operate from an earlier date[42]. It is interesting to note that the authors Currie and Klaaren[43] are of the view that the procedural aspects of PAIA, *viz*., the right to access records on request and the appeal or review of refusals of access, only have ***"prospective effect"***. The authors proceed to say that:

> ***"The Act's few transitional provisions (ss 86, 87 and 88) provide timelines and extensions for implementation and do not regulate pre-commencement access to information requests or claims. TheAIA's drafters intended and expected that the Act would be put into effect soon after it was passed and before the 4 February 2000 deadline for enactment of the legislation. In fact, more than a year passed between enactment (2 February 2000) and the coming into operation of the major part of the Act (9 March 2001). For this period of approximately thirteen months it appears that the wording set out in schedule 6 continued in force."*** (my emphasis).

For their contention in the last sentence of the above-quoted passage, the authors refer to, among others, the case of ***Nextcom (Pty) Ltd v Funde NO***[44], where Bertelsmann, J, held that the fundamental right of access to information was still protected in the terms contained in

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42 ***National Director of Public Prosecutions, v Carolus and others***, *supra,* para's [33] and [34], pp 1138 F - 1139 B.

43 Currie, I, & Klaaren, J, **The Promotion of Access to Information Act Commentary**, at para [3.10], pp 38 - 39.

44 2000(4) SA 491 (T) at 503 C.

Schedule 6 to the Constitution because PAIA, although assented to, had not yet come into operation. It is now apparent that this is incorrect[45]. In my view there is much to be said for the arguments presented on behalf of Biowatch and those presented on behalf of the *amicus curiae* against the retrospective operation of PAIA. This is not a case where Biowatch did nothing to take advantage of its rights under section 32 of the Constitution. In the present case Biowatch on no less than four occasions availed itself of its right to information by some individual action or effort on its part[46]. Consequently, if one were to apply PAIA's provisions retrospectively in the manner contended for by the respondents those provisions would certainly interfere with Biowatch's then existing rights, because it would have the effect of rendering its requests for information invalid simply on the grounds that they were not made in terms of, and did not comply with, PAIA, which was in any event not in force at the time such requests were made. In turn, it would have the further effect of denying Biowatch the very right it was seeking to exercise under section 32 of the Constitution.

[30] In developing his argument on behalf of Monsanto, one of the submissions Mr Wilson made is that Biowatch's right of access to information[47]:

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45 ***Investigating Director of the Investigating Directorate: Serious Economic Offences and Another v Gutman, NO***, 2002(4) SA 230 (SCA) at para's [13] to [15], pp 235 H - 236 E; ***Ingledew v Financial Services Board,*** 2003(4) SA 584 (CC) at para [36], p 596 B – D.

46 ***Mahomed NO v Union Government (Minister of the Interior)***, 1911 AD 1 at pp 9 - 11; ***Chairman, Board on Tariffs and Trade v Volkswagen of South Africa (Pty) Ltd and Another***, 2001(2) SA 372 (SCA) at para's [14], p 387 B – C.

47 Monsanto's head of argument; para 34, pp 15 - 16.

> "***…only accrued*** **or** '***crystallised' when it launched its application on 22 August 2002, and accordingly its right falls to be determined by reference to the provisions of the PAIA Act that were then in operation***".

In this regard Mr Wilson referred to the ***Gutman's***-case, *supra*,[48]. It will be apparent from the views that I have already expressed, that I do not agree with Mr Wilson's submissions in this regard. In the first place, I do not agree that Biowatch's right of access to information only accrued or crystallised when it launched the present proceedings. In my view its rights in this regard accrued or "***crystallised***" on each of the occasions on which it submitted its requests for information to the Registrar[49]. As far as the ***Gutman's***-case, *supra*, is concerned, it is clear that the court was not then concerned with the retrospective application of PAIA in a manner that would interfere with any existing rights. In the latter case the request for access to the contested information and the application to enforce the disclosure thereof all occurred prior to PAIA coming into operation. The ***Gutman's***-case, *supra*, does not constitute authority for Mr Wilson's submission that the relevant time for determining the applicable statutory regime, is the date on which the present application was launched. In fact, the court in that case specifically disallowed any intention of expressing an opinion on the applicability or otherwise of PAIA to any subsequent steps the respondent therein might take in the future to obtain access to the documents in issue[50]. For the very same reason I disagree with

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48 See, in this regard, footnote 44, above.

49 See, in this regard, para 19, above.

50 ***Gutman's***-case, *supra*, at para [37], p 241 C.

a similar submission made by Mr Chaskalson, in the course of his thorough argument on behalf of Stoneville[51].

[31] Mr Wilson's further submission on behalf of Monsanto was that, even if Biowatch's right of access to information accrued during the hiatus period, the coming into effect of PAIA did not interfere with such right, because in merely "***gave effect***" to that right[52]. In developing this argument Mr Wilson also submitted that there is no unfairness in applying PAIA to all applications for access to information initiated after its commencement and that, if the provisions of PAIA are then applicable to the present proceedings, the application was clearly premature in terms of section 78 of PAIA. This is because Biowatch never initiated or exhausted its internal procedures[53]. Counsel for the fist to third respondents presented a similar argument[54].

[32] My earlier finding to the effect that the provisions of PAIA cannot - indeed should not - be applied retrospectively so as to render any of Biowatch's requests for information invalid solely because they did not comply with PAIA, does not entirely dispose of Mr Wilson's latter, not entirely unattractive, arguement. After all, Biowatch's fourth request was only made on 26 February 2001, i.e. some eleven days prior to

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51 Stoneville's heads of argument: para 24.1, p 16.

52 Monsanto's heads of argument: para 35, pp 16 - 17.

53 Montanto's heads of argument: para's 35 - 42, pp 16 - 19.

54 First to third respondents' heads of argument: para 10.1, p 10, read with Registrar (answering affidavit): para 6.2, p 104

PAIA coming into operation. Since internal appeals have to be lodged within 60 days, it would have possible for Biowatch, if it was indeed obliged to follow the internal appeal route, to have done so. The complete answer to this argument on behalf of the first to third respondents and Monsanto is this: Section 78 of PAIA[55] only requires a requester or third party to exhaust:

> ***"...the internal appeal procedure <u>against a decision of the information officer of a public body provided for in section 74</u>***" (my emphasis)

Section 74(1) of PAIA[56], in turn, only makes provision for an internal appeal against a "***public body***"[57], as contemplated in paragraph (a) of the definition of that expression in section 1 of PAIA. The Registrar and the Council are clearly not public bodies of the kind contemplated in paragraph (a) of that definition. On the other hand the Registrar and

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55 Section 78(1) of PAIA reads as follows:

> ***"A requester or third party referred to in section 74 may only apply to a court for appropriate relief in terms of section 82 after that requester of third party has exhausted the internal appeal procedure against a decision of the information officer of a public body provided for in section 74" .***

56 Section 74(1) of PAIA reads as follows:

> "***A requester may lodge an internal appeal against a decision of the information officer of a public body referred to in paragraph (a) of the definition of 'public body' in section 1 –***
> ***(a) to refuse a request for access; or***
> ***(b) …***
> ***in relation to that requester with the relevant authority***."

57 The expression ***"public body***" is defined in section 1 of PAIA to mean:

"(a) any Department of State or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
(b) any other functionary or institution when -
(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation;"

the Council are public bodies of the kind contemplated in paragraph (b)(ii) of that definition, i.e. public bodies ***"... exercising a public power or performing a public function in terms of any legislation"***. This means that the mandatory internal appeal procedure provided for in section 74 – read with section 78(1) - of PAIA finds no application in respect of Biowatch's requests. This is fortified by section 78(2)(c) of PAIA, which states that a requester, who is aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of "***public body***", to refuse a request for access may apply to a court for appropriate relief.

[33] This brings me to the arguments presented on behalf of Stoneville. In this regard Mr Chaskalson's argument was developed along the following lines: First, he emphasised that since Biowatch was seeking a mandatory interdict it had to establish a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection by any other remedy[58]; second, he submitted that although the transitional right to information created by Item 23(2) of Schedule 6 to the Constitution had ceased to operate and that section 32(1)(a) of the Constitution conferred a right of access to any information held by the State, the latter right was limited by the provisions of section 18 of the GMO Act[59] and by section 31(1)(c) of NEMA[60]; and, third, because

[58] Stoneville's heads of argument: para 14, p 10, where the following authorities are cited in support of this submission, *viz* ***Setlogelo v Setlogelo, 1914 AD 221 at 227;*** and ***Alliance Cash & Carry (Pty) Ltd v Commissioner, South African Revenue Services,*** 2002(1) SA 789 (T) at 795 H - I.

[59] See, in this regard, footnote 18, above.

[60] Section 31(1) of NEMA provides as follows:

Biowatch did not challenge the constitutional validity of section 18(1) of the GMO Act and/or section 31 of NEMA, those provisions must be presumed to be constitutionally valid with the result that the limitations contained therein place constitutionally permissible limitations on section 32 of the Constitution. This all demonstrates, according to counsel's submissions, that Biowatch never had any clear right to the information sought by it[61]

[34] The inclusion of a right of access to information in the form of section 32(1)(a) of the Constitution is unusual. The statutory regime of many countries merely provide for a "***freedom***" - as opposed to a "***right***" - to

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"***(1) Access to information held by the State is governed by the statute contemplated under section 32 (2) of the Constitution: Provided that pending the promulgation of such statute, the following provisions shall apply:***

(a) every person is entitled to have access to information held by the State and organs of state which relates to the implementation of this Act and any other law affecting the environment, and to the state of the environment and actual and future threats to the environment, including any emissions to water, air or soil and the production, handling, transportation, treatment, storage and disposal of hazardous waste and substances;

(b) organs of state are entitled to have access to information relating to the state of the environment and actual and future threats to the environment, including any emissions to water, air or soil and the production, handling, transportation, treatment, storage and disposal of hazardous waste held by any person where that information is necessary to enable such organs of state to carry out their duties in terms of the provisions of this Act or any other law concerned with the protection of the environment or the use of natural resources;

(c) a request for information contemplated in paragraph (a) can be refused only:

(i) if the request is manifestly unreasonable or formulated in too general a manner;

(ii) if the public order or national security would be negatively affected by the supply of the information; or

(iii) for the reasonable protection of commercially confidential information;

(iv) if the granting of information endangers or further endangers the protection of the environment; and

(v) for the reasonable protection of personal privacy";

and see too: Stoneville's head of argument: para's 15 and 16, pp 10 - 13.

[61] Stoneville's heads of argument: para's 17 - 21, pp 13 - 15.

information[62]. The purpose behind the positive right embodied in section 32(1) is the facilitation of transparent and accountable government, as required by Constitutional Principle IX set out in Schedule 4 to the interim Constitution, 1993 (Act No 200 of 1993)[63].

[35] In its own terms section 32(1)(a) of the Constitution - unencumbered by the transitional information right created by Item 23(2) of Schedule 6 to the Constitution - is an unlimited right. However, it is not an absolute right and is subject to limitation in terms of section 36 of the Constitution. All Organs of State are bound by section 32(1)[64] and have an obligation to respect, protect, promote and fulfil the right created therein, together with all the other rights contained in the Bill of Rights[65].

[36] Do the provisions of section 18 of the GMO Act and section 31(1) of NEMA constitute permissible limitations on the right of access to information in section 32(1)(a) of the Constitution? As far as section 31(1) of NEMA is concerned, its provisions ceased to apply the moment PAIA was promulgated. For that reason alone section 31 of

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62 Devenish, GE, Govender, K, and Hulme, D, **Administrative Law and Justice in South Africa,** (Butterworths, 2001), at 186; and Davis D, Cheadle, H, and Haysom, N, **Fundamental Rights in the Constitution***;* **Commentary and Cases**, (Juta & Co Ltd 1997), at 147.

63 ***Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa***, ***1996***, 1996(4) SA 744 (CC) at para 83, p 802 G - H.

64 Section 8(1) of the Constitution.

65 Section 7(2) of the Constitution.

NEMA *per se* cannot constitute a permissible limitation on any of Biowatch's requests for information or to the application in the present proceedings. The attempt by Biowatch to rely on section 31 of NEMA in the present application was in any event misplaced.

[37] As far a section 18 of the GMO Act is concerned, the prohibition against the disclosure of information in subsection (1) thereof is not absolute. There are a number of exceptions to the prohibition. Two of these exceptions allow for disclosure:

> ***"(a) insofar as it is necessary for the proper application of the provisions of this Act;***
>
> ***(c) when ordered to do so by any competent court"***

The terms of the second exception referred to are clear. Any person who has acquired information through the exercise of his or her powers or the performance of his or her duties in terms of the GMO Act, can be authorised to disclose such information if and when ordered to do so by any competent court. It can readily be assumed that this exception would also apply to the Registrar since any information in his possession would of necessity have been acquired by him through the exercise of his powers or the performance of his duties in terms of the GMO Act. But what about the first mentioned exception, i.e. disclosure permitted insofar as it is necessary for the proper application of the provisions of the GMO Act? Can it be said that the disclosure of information, or, put differently, the granting of access thereto, is a necessary adjunct for the proper application of the provisions of the

GMO Act? As indicated earlier the right of access to information is intended to serve a wider purpose, namely to ensure that there is open and accountable administration at all levels of government[66] - a vital ingredient in our new constitutional culture and in an open and democratic society[67]. The disclosure of information, or the granting of access to information, should therefore, in my view, be necessary for the proper application of the provisions of the GMO Act. In other words the Registrar is not prohibited from disclosing any information acquired by him through the exercise of his powers or the performance of his duties under the GMO Act, if such disclosure is aimed at giving effect to the right to access of information enshrined in section 32(1)(a) of the Constitution. Our constitutional dispensation after all enjoins the State - acting through its appointed officials - to positively respect, protect, promote and fulfil the rights in the Bill of Rights in Chapter of the Constitution. To interpret section 18(1)(a) of the GMO Act in the aforementioned fashion, which in my view it should be, would also be in keeping with the constitutional imperative of interpreting legislation in a manner that promotes the spirit, purpose and objects of the Bill of

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66 In this regard it is also interesting to note that one of the objects of PAIA, which is aimed at giving effect to the constitutional right to access the information, is to generally promote transparency, accountability and effective governance of all public and private bodies with the aim of, among other things, enabling persons to effectively scrutinise, and participate in, decision making by public bodies that effect their rights. Cf. section 9(e)(iii) of PAIA.

67 Section 41(1)(c) of the Constitution enjoins all spheres of government and all organs of state within each sphere to provide effective, transparent, accountable and coherent government. See too, in this regard, ***Olitzki Property Holdings v State Tender Board and Another,*** 2001 (3) SA 1247 (SCA) at para 31, p 1263 C - E; ***Minister of Safety and Security v Van Duivenboden,*** 2002(6) SA 431 (SCA) at para 20, p 445 - especially at p 446 C - E.

Rights[68]. In the result, I do not agree with counsel for Stoneville's submissions to the contrary. Counsel further submitted that the Registrar's refusal to provide Biowatch with the exact co-ordinates of the location where the GMO field trials are being undertaken[69] should be treated as a legally valid decision as Biowatch at no stage attempted to review it[70]. In ***Gutman's***-case, *supra*, it would appear as if a similar argument was raised. At paragraph [33][71] the court (per Heher, AJA, as he then still was) stated the following:

> "***It does not make much sense to countenance only a review of the exercise of the powers of the Investigating Director while the section recognised the right of a Court to order disclosure by any of the persons subject to the sanction without the restrictions inherent in review procedures***."

In the present case a similar situation pertains, in that section 18(1)(c) of the GMO Act expressly recognises the right of a court to order disclosure by anyone subject to the general prohibition without the restrictions inherent in a review procedure. At the time Biowatch submitted its requests for information to the Registrar, it did not rely on section 31 of NEMA and there is no indication in the Registrar's written

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68 Section 39(2) of the Constitution. This interpretation does not defeat any of the objects the GMO Act is aimed at furthering.

69 Registrar's letter dated 25 October 2000 (annexure "EPS8(6)"), pp 160 - 161, especially the answer to "*Question 6*" p 160, i.e. an answer to Biowatch's third request (Biowatch's third request (annexure "EPS8(5)"), pp 158 - 159).

70 Stoneville's heads of argument: para's 20 - 21, pp 14 - 15.

71 ***Gutman's***-case, *supra*, para [33], p 240 B - D.

response to any of Biowatch's requests for information that he refused such information pursuant to the provisions of section 31(1)(c).

BIOWATCH'S FAILURE TO EXHAUST THE INTERNAL REMEDIES

[38] I have already found that section 78, read with section 74, of PAIA does not constitute an obstacle to the relief presently claimed. However, counsel for the first to third respondents and counsel for the Monsanto, both contended that Biowatch was required, but failed, to exhaust the internal appeal procedure contained in section 19 of the GMO Act. They submitted that section 19 of the GMO Act is intended to constitute an exclusive domestic remedy which must be exhausted prior to any application to court[72]. The appeal remedy created in section 19 of the GMO Act[73] allows for an appeal against any decision or action taken by the Council, the Registrar or an inspector. From the facts of this case the only discernable decision or action by either the Registrar or Council, is the Registrar's decision, in relation to Biowatch's third request, to refuse to provide Biowatch with the exact co-ordinates of the locations where field trials are undertaken[74]. Within

[72] First to third respondents heads of argument: para 10, pp 10 - 13; Monsanto's heads of argument; para's 48 - 63, pp 21 - 26.

[73] Section 19(1) of the GMO Act provides:

> ***"A person who feels aggrieved by any decision or action taken by the Council, the registrar or an Inspector in terms of this Act, may, within the period and in the manner prescribed and upon payment of the prescribed fee, appeal against such decision or action to the Minister, who shall appoint an Appeal Board for the purpose of the appeal concerned".***

[74] Registrar's letter dated 25 October 2000 (annexure "EPS8(6)"), p 160, read with Biowatch's third request (annexure "EPS8(5)"), p 158.

the greater scheme of Biowatch's requests for information, the Registrar's latter decision only relates to one item of information sought. It is quite clear that neither the Registrar nor the Council has taken any decision[75] in respect of the information sought in Biowatch's fourth request[76]. Any appeal against the Registrar's decision in refusing to provide Biowatch with the exact co-ordinates of GMO field trials undertaken, will hardly provide an effective redress for Biowatch in the present instance[77]. The GMO Act does not expressly state that recourse to the courts is to be deferred until the internal appeal procedure provided for in section 19 thereof is exhausted. But that is not necessarily decisive of this question[78]. Although an Appeal Board appointed by the Minister under section 19 of GMO Act has the power to confirm, set aside or amend any decision or action which is subject of the appeal, there is no other provision in the Act which impels the conclusion that any resort to the ordinary courts is deferred until an appeal in terms thereof is disposed of. While section 18(1)(c) of the GMO Act recognises the right of a court to order disclosure of information, it also does not make much sense to insist that Biowatch should have exhausted the appeal remedy catered for in section 19 of the GMO Act. In the result Biowatch's failure to follow the internal

[75] In passing, I should perhaps mention that I do not agree with counsel for Monsanto's submission - in paragraphs 53 and 53, p 23, of its heads of argument - that section 6 of the Promotion of Administrative Justice Act, 2000 (Act No 3 of 2000) necessarily provides any guidance in interpreting the meaning of "***decisions***" and "***actions***" in section 19 of the GMO Act

[76] Biowatch's fourth request (annexure EPS9), pp 179 - 184.

[77] Baxter, L, **Administrative Law,** Juta & Co, Ltd (1984), at 721.

[78] ***Lawson v Cape Town Municipality***, 1982(4) SA 1 (C at 6B - 9A).

appeal procedure catered for in section 19 of the GMO Act is not necessarily destructive of the relief sought by it in this application.

COMMERCIAL CONFIDENTIALITY AND PRIVACY

[39] All the respondents adopt the same positio with regard to commercial confidentiality. All of them contend that some of the information to which this application relates is confidential and should not be disclosed[79]. Counsel for Monsanto[80], Stoneville[81] and D&PL SA, to varying degrees, argued the issue of the protection of confidential, technological and private information that would justify a refusal to grant access to the information sought by Biowatch. There is certainly substance in these submissions. The right of access to information is not an absolute right and it has to be balanced with justifiable governmental and private concerns for maintaining confidentiality of certain information. As Mr Chaskalson correctly pointed out, courts are institutionally ill-suited to the polycentric nature of such a task.[82]

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79 Registrar (answering affidavit): para 37, p 216;
Green (answering affidavit): para's 33 - 70, pp 269 – 284;
Brooderyk (answering affidavit): para 7, pp 380 - 381: para 12.2, p 382: para 17.2, p 385;
Olivier (answering affidavit): para 11 - 22, pp 452 - 470.

80 Monsanto's heads of argument: para's 64 - 81, pp 26 - 33.

81 Stoneville's heads of argument: para 90, pp 13 - 14, read with, among others, para 31, pp 21 - 22, thereof.

82 ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others***, 2004(4) SA 490 (CC) at para [46], p 513 E - p 514 B: ***Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd,*** 2003(6) SA 407 (SCA) at para's 40 [47] - [50], pp 430 E - 431 H.

[40] Monsanto and D&PL SA in particular relied on the statutory regime provided for in Chapter 4 of Part 2 of PAIA to justify refusal of access to the records currently sought by Biowatch. Stoneville, on the other hand, did not specifically refer to any of the provisions in Chapter 4 of Part 2 of PAIA, but contended in general that the provisions of PAIA cater for the preservation of the confidentiality interest it has in commercially significant information and, as well as its contractual obligation to protect the identities and address of farmers who provide it with land and services. I stated earlier that the provisions of PAIA cannot be applied retrospectively to nullify the validity of Biowatch's requests for information. But I am not convinced that it cannot be applied retrospectively to the degree that the Registrar would be entitled to rely on the provisions of Charter 4 of Part 2 thereof as grounds for refusal of access to the records sought. In ***L 'Office Cherifien des Phosphates and Another v Yamashit-Shinnihon Steamship Co Ltd: The Boucraa***[83], the House of Lords was concerned with a new statutory provision that amended the Arbitration Act, 1950. The new statutory provision empowered an arbitrator to make an award dismissing a claim if there had been an inordinate and inexcusable delay on the part of the claimant which caused substantial risk of unfairness or serious prejudice to the other party. Lord Mustill, who delivered the main opinion in the case, approvingly referred to the following statement by Staughton, LJ, in ***Secretary of State for Social Security and Another v Tunnicliffe***[84], *viz:*

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[83] [1994] 1 All ER 20.

[84] [1991] 2 All ER 712 (CA) at 724 f - g.

> ***"In my judgement the true principle is that Parliament is presumednot to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is expected that Parliament will make it clear if that is intended."*** (my emphasis)

After referring to the aforesaid statement Lord Mustill proceeded as follows:[85]

> "***Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the right which the statute affects, or the extent to which the value is diminished or extinguished by the respective effect of the statute. Again, the unfairness of adversely affecting rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say***" (my emphasis).

[85] at 30 e - g.

Once it is recognised that Biowatch never had an absolute right of access to information under section 32(1)(a) of the Constitution[86] and that PAIA was enacted to give effect to this right, it would not be unfair to Biowatch, or for that matter any of the other parties involved in this application, if the grounds for refusal of access to records contemplated in Chapter 4 of Part 2 of PAIA were to find application. I say that it will not be unfair to Biowatch, because it never had any absolute right of access to information. At best its right for access to information was subject to the general limitation clause in section 36 of the Constitution. Obviously the onus of justifying such a limitation would be on the party who seeks to limit the right[87]. The same applies to PAIA, because the burden of establishing that the refusal of a request for access is justified rests on the party claiming the refusal[88]. The retrospective application of PAIA to the degree indicated also promotes even-handedness in the operation of the law[89] and avoids the difficulty of undertaking the

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[86] Exemptions of a uniform nature appear in the statutory regimes of most countries that have freedom of information legislation. Consequently, if the courts were to have engaged in developing a system of exemptions under the limitations clause, it is more than likely that they would have sought guidance on this issue in the legislation of those countries with such legislation. Generally such limitation range from the right to refuse access to information in the interest of, among others, law enforcement, confidential business information and trade secrets, privacy and the like. Cf. Cheedal, NH, Davis, DM, Hassim, NRL, **South African Constitutional Law: the Bill of Rights,** (Butterworths, Durban, 2002, at 583).

[87] ***S v Makwanyane and Another***, 1995(3) SA 391 (CC) at para [102], p 435 H - p 436 A.

[88] Section 81(3) of PAIA.

[89] ***Kruger v President Insurance Co Ltd,*** 1994(2) SA 495 D at 503 F - G.

balancing exercise crafted in the provisions of Chapter 4 of Part 2 of PAIA.

[41] In view of these considerations, I am of the view that the Registrar would be entitled to rely on the provisions of Chapter 4 of Part 2 of PAIA to refuse access to any record - if he were honestly and *bona fide* of the opinion that such a refusal is justified - on the grounds contemplated in Chapter 4 of Part 2 of PAIA: Provided, of course, that he would not be entitled to do so merely because Biowatch's requests for information were not made in the form or in the manner prescribed in PAIA.

FAILURE TO ARTICULATE THE INFORMATION SOUGHT

[42] All the respondents adopted the standpoint that Biowatch's formulation of the information it sought was unsatisfactory. On behalf of the first to third respondents Mr Rip submitted that the information sought is so wide as to make it extremely difficult for the Registrar and the Council to properly respond thereto[90]. On behalf of Monsanto, Mr Wilson submitted that the request for information is symptomatic of inherent vagueness and overbreadth and that it amounted to a "***fishing expedition***"[91]. Similarly Mr Chaskalson, on behalf of Stoneville, submitted that Biowatch's - as he put it -"***... catch-all requests ... were***

[90] First to third respondents heads of argument: para11.1, p 13.

[91] Monsanto's heads of argument: para's 10 - 12.

clearly vexatious and oppressive". [92] Mr Du Plessis, on behalf D&PL SA, joined in this criticism.[93] There is certainly substance in these submissions. Unfortunately, Biowatch also did not engage in the task of specifying in its notice of motion the precise list of information it seeks access to. Its approach seems to have been to expect the respondents and the court to read through all the correspondence and to divine precisely what information is requested and what information is still outstanding. In different contexts our courts have enforced a standard that requires documents to be intelligibly identified. The standard sought to be maintained by the courts applies to documents requested in terms of rule 35(14) of the Uniform Rules of Court[94] and to subpoenas issued under rule 38(1) thereof.[95]

[43] It should however be borne in mind that the rules of court are designed to cater for situations where opposing litigants are already involved in a legal tussle with one another. Rule 35(14) only entitles a party to require "***a <u>clearly specified document or tape recording</u> in his possession which is relevant to a reasonably anticipated issue in the action...***" (my emphasis) for purposed of pleading. Rule 38(1) of the Uniform Rules of Court specifically states that a subpoena -

[92] Stoneville's heads of argument: Para's 10 and 11, pp 8 - 9.

[93] No heads of argument were presented on behalf of D&PL SA and its counsel merely made certain oral submissions at the hearing of this application.

[94] ***Quayside Fish Suppliers CC v Irvan & Johnson Ltd*** 2000(2) SA 529(C) at para's [15] and [16] p 533 H - 534 I; and ***Cullinan Holdings Ltd v Mamelodi Stadsraad,*** 1992(1) SA 645 T at 647 H - I; and 648 F - G.

[95] Page 735 C - F and 736 E - F.

requiring a witness to produce a document at court - shall ***"... specify such document***". The same obviously apply to search warrants which should not be couched in overbroad terms that could result in an unwarranted breach of an individual's privacy. Requests for access to information under section 32 of the Constitution should obviously not be formulated in too general a manner. But requesters for information under section 32 of the Constitution - or for that matter under PAIA - would not always have knowledge of the precise description of the record in which the information sought, is contained. In the present case the Registrar - notwithstanding Mr Rip's submission to the contrary - never stated in his answering affidavit that he had any difficulty in ascertaining precisely what information Biowatch was looking for from time to time. The Registrar's subjective opinion about Biowatch's requests for information cannot convert an oppressive request into an unoppressive one or *vice versa*. The request still needs to be considered objectively. But what is important about the Registrar's viewpoint is this, namely, that if he had any doubt about the nature and or validity of Biowatch's requests he was, in my view, enjoined to establish precisely what it was seeking and to assist it in its endeavours to achieve that. The Registrar was not entitled to adopt a passive role in the regard.[96] If, after having engaged Biowatch, he had any doubt about the *bona fides* of its requests and that he genuinely opined that it was vexatious and oppressive or unintelligible he could

[96] Section 7(2) of the Constitution. In this regard it is also interesting to note that section 19 of PAIA enjoins an information officer of a public body to assist requesters with their requests for information.

and should have refused it on that ground. The fact that he did not do so is rather significant.

[44] Despite the obvious merit in some of the submissions made on behalf of all the respondents in connection with the overbreath of Biowatch's requests for information, I do not believe that the interests of justice will be served if Biowatch were to be non-suited on that ground alone. The information sought by Biowatch and possible objections to the overbreadth of its requests will be considered next.

AN ANALYSIS OF THE INFORMATION SOUGHT

[45] The information sought in Biowatch's first request is sufficiently specific. However,the problem it has with this request is that it had knowledge of all the information sought therein at the time this application was launched. It had been provided with a list of the crops for which licences were granted for conducting GMO field trials. This much is evident from the Registrar's response of 26 October 2000.[97] As far as the second item contained therein is concerned, Biowatch then also knew that the Registrar does have information on the location of the GMO field trials. This much is evident from the Registrar's response of 25 October 2000.[98] The third item mentioned in Biowatch's

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97 Registrar's letter dated 26 October 2000 (annexure "EPS8(4)"), p 156, especially the second unnumbered paragraph thereof.

98 Registrar's letter dated 25 October 2000 (annexure "EPS8(6)"), pp 160 - 178, especially the last unnumbered paragraph on p 160, read with annexure "C" thereto, p 176.

first request is a question aimed at establishing whether Bt maize had commercially been released. As at 23 August 2000 Biowatch was aware that Bt maize had commercially been released as its letter of 23 August 2000 demonstrates.[99] In the result Biowatch is not entitled to any of the information expressly sought in its first request. The reference to annexure EPS8(1) in the notice of motion can, and should, therefore be ignored.

[46] As far as Biowatch's second request[100] is concerned, the Registrar and the Council have still not satisfactorily responded to Biowatch's request. However, the information sought in Biowatch's second request is essentially repeated in paragraph (i) of the Schedule ("***the Schedule***") to its fourth request.[101] In fact the information sought in paragraph (i) of the Schedule is more expansive than the information sought in Biowatch's second request, in that it now seeks access to "***All data relating risk assessments..."*** including the data previously sought in the second request. The only other difference between the information currently sought and that contained in Biowatch's second request, is that the manner of the access it seeks to such informations is not specified. In Biowatch's second request access was sought in the form of an inspection by Jardine. For present purposes I shall

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[99] Biowatch's second request (annexure "EPS8(2)"), pp 153 - 154, especially the last unnumbered paragraph on p 153.

[100] Biowatch's second request (annexure "EPS8(2)"), pp 153 - 154.

[101] Biowatch's fourth request (annexure "EPS9"), p 179 *et seq.* especially para (i), p 183.

assume that Biowatch still seeks access in the form of an inspection of the information sought.

[47] Monsanto, Stoneville and D&PL SA are concerned that access to this information will reveal information that is confidential or that contains trade secrets or that may even breach the privacy of third parties, e.g. farmers conducting GMO field trials on their behalf. This is a legitimate concern. It should properly be catered for. Consequently, if the Registrar and the Council were to be permitted to refuse access to any record, or such portion of any record, that contains protectable information in terms of the specific grounds of refusal provided for in Chapter 4 of Part 2 of PAIA, that would still allow Biowatch access to the information it seeks in any record, or those portions any record, that is or are not immune from disclosure. At the same time it should allay the latter respondents' fears about their protectable interests in the information mentioned by them.

[48] Given the fact that the information sought by Biowatch in its second request is included in its fourth request, it was entirely unnecessary, to refer to its second request in the notice of motion.

[49] As far as Biowatch's third request is concerned,[102]an analysis reveals four deficiencies in the Registrar's response[103]to it. These deficiencies are identified in paragraph [21], above. I do not intend repeating them

[102] Biowatch's third request (annexure "EPS8(5)"), pp 158 - 159.

[103] Registrar's letter dated 25 October 2000 (annexure EPS8(6)), p160 - 178.

here again. It is evident that the information to which such deficiencies pertain was again sought in paragraphs (iv) – although this paragraph is much wider than the previous item - (v), (vi), and (vii). The only discernable difference between the two is that in Biowatch's third request the form of access required is mostly stated to be by way of inspection. For present purposes I shall assume that Biowatch still requires such form of access. If Biowatch wishes to make any copies of the records in which such information is embodied it can make further arrangements with the Registrar.

[50] In view of these considerations it was, in my opinion, also entirely unnecessary for Biowatch to have referred to its third request in the notice of motion since all the information sought by it is adequately catered for in its fourth request.

[51] This brings me to Biowatch's fourth request, the details of which are quoted in paragraph [23], above. I will deal with each of the items contained therein sequentially:

Ad Item 1 thereof

[52] Although this item commences with the words "***All data relating to risk assessments...***", which at first blush appear to be rather wide, it is immediately narrowed by the words that follow, *viz*., **"*... accompanying requests for trial and commercial release of***

GMO's...". In my view this request is sufficiently intelligible for the Registrar and the Council to identify the information sought. The only problem with the formulation is that it may include the type of data Monsanto, Stoneville and D&PL SA are concerned about. However, their concerns can adequately be provided for in the manner referred to above.

Ad Item (ii) thereof

[53] I consider that this request is unreasonably vague. Biowatch should have indicated with greater precision what data it is interested in concerning "***RR wheat***".

Ad Item (iii) thereof

[54] The formulation of this request is intelligible. In Biowatch's third request it sought inspection of these records. Any information contained in these records that Monsanto, Stoneville and D&PL SA are concerned about could adequately be protected in the manner indicated above.

Ad Item (iv) thereof

[55] Sufficient particulars have been provided to make the information sought under this item intelligible. In my view access thereto should be

granted subject, of course, to the proviso that access could be refused to the extent that any information contained therein is protectable in terms of Chapter 4 of Part 2 of PAIA.

Ad Item (v) thereof

[56] Sufficient particularity has, in my view, been given for the type of records to which access is sought under this item.

Ad Item (vi) thereof

[57] The information requested pertains to "***... exact locations of field trials and commercial releases...***". Monsanto answered this particular request in the following terms[104]:

> ***"Paragraph (vi) also potentially includes confidential information of Monsanto. ... Notwithstanding that Biowatch has already been furnished (as it is entitled to be) with the locations (defined by towns) where trials are being conducted ... Biowatch persists in demanding the exact co-ordinates of these trials. For obvious reasons, and based on the experience of the Monsanto Group in other countries, Monsanto is concerned about third party interference with such trials and accordingly regards such information as highly confidential. <u>Moreover, third parties have no statutory right to be furnished with the exact co-ordinates (as opposed to the location) of such trials</u>."***
> (my emphasis).

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[104] Green (answering affidavit): para 54, p 276 - 277. See too, in this regard, Monsanto's heads of argument: para 77, pp 31 0 32.

I agree with the statement that Biowatch, or for that matter any other third party, has no statutory right to be furnished with the exact co-ordinates of the locations of such trials. In terms of the regulations made under the GMO Act, regulation 6(3) requires an applicant who proposes to release GMO's to notify the public thereof by publishing, in at least three newspapers circulating in the area in which the proposed release is to take place, a properly completed notice.[105] Such notice should, among other things, specify the full name and address of the applicant, a full description of GMO that the applicant proposes to release, a description of the proposed trial release (including the area and environment in which the release is to take place) and, also invite interested parties to submit comments or objections in connection with

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105 Regulation 6 provides as follows:

(1) The applicant shall notify the public of any proposed release of genetically modified organisms prior to the application for a permit for such release.
(2) Public notification shall be in the form of a standard notice published in the printed media informing the public of the intended release.
(3) The notice referred to in subregulation (2), shall be obtainable from the office of the registrar and shall, inter alia, require the applicant to fill in the following details:
(a) full name and address of the applicant;
(b) a full description of the genetically modified organisms that the applicant proposes to release;
(c) a description of the proposed trial release, including the area and environment in which the release is to take place;
(d) a request that interested parties submit comments or objections in connection with the intended release to the registrar within a period specified in the notice: Provided that such period shall not be less than thirty (30) days after the date on which the notice appears in the media; and
(e) the address, of the registrar, to which comments or objections may be submitted.
(4) The applicant shall publish the completed notice in at least three newspapers circulating in the area in which the proposed release is to take place.
(5) A copy of the notice and proof of publication thereof shall accompany the application for the release.
(6) The registrar shall refer any comments or objections received from interested parties to the Council.
(7) The Council shall, when considering an application for a release, consider all the comments and objections referred to the Council in connection with the said application.

the intended release within a specified period. Nothing in this regulation suggests that the Registrar will have in his possession the exact co-ordinates of the location in which the release is to take place. Nevertheless, in order to properly inform the public of any such proposed release – i.e. so as to enable them to intelligibly seize the opportunity to make informed decisions and contribute to the public debate - it is difficult to imagine that the mere reference to a town or magisterial district such as, for example, Delmas, Grahamstown, Klerksdorp, Elsenburg, Lichtenburg and Groblersdal,[106] etc, would suffice for the intended purpose contemplated in regulation 6(3)(c). If the area and environment in which the release is to take place was specified in greater detail in any notice that was published under regulation 6, Biowatch would be entitled to see that information insofar as it consists of information that is already in the public domain[107]

[58] To summarise, Biowatch is not entitled to the exact locations, in the sense of exact co-ordinates, of the field trials and commercial releases. At best it would entitled to the exact information published in terms of regulation 6(3) including the area and environment where the GMO's are proposed to be released.

[59] Under this item Biowatch seeks access - in the form of copies - of the minutes of all meetings of the Council and its advisory committee up to

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106 Registrar's letter dated 5 October 2000 (annexure EPS8(6)), p 160, especially annexure C, p 176, thereto.

107 Section 36(2)(a) and section 37(2)(a) of PAIA.

the date of the request. Although this request, at first blush, appears somewhat wide, it is certainly not vague. In my view there is no reason why Biowatch should not be given access to this information, subject, once again, to any possible grounds of refusal that may exist under Chapter 4 of Part 2 of PAIA.

Ad Item (vii) thereof

[60] In Biowatch's third request it sought access in the form of an inspection to the register of academic and research institutions. Instead it was given a list of registered facilities for the year 2000. The present request is for full details of registered academic and research institutions for the years 1999 to 2001. The request is sufficiently particularised, but the form of access is not specified. In principle and theory there should be not reason why Biowatch would not be entitled to this information.

Ad Item (viii) thereof

[61] Under this item Biowatch seeks access - in the form of copies - of the minutes of all meetings of the Council and its Advisory Committee up to the date of the request. Although this request, at first blush, appears somewhat wide, it is certainly not vague. In my view there is no reason why Biowatch should not be given access to this information, subject, once again, to any possible grounds of refusal that may exist under Chapter 4 of Part 2 of PAIA.

Ad Item (ix) thereof

[62] The request in this item reads as follows:

> ***"Copies of all internal, interdepartmental, interstate departmental and/or external letters, telefaxes, e-mails, circulars, memoranda and similar documents which relate to the development, production, use and application of GMO's"***.

[63] The manner in which this request is phrased is, in my view, objectionable. Not only is it overbroad, but it is further bedevilled by the use of expressions such as "***and/or***" and "***similar documents***".

Ad Item (x) thereof

[64] The information requested in this item is sufficiently particularised and unobjectionable. Possible concerns that might arise could relate to privacy interests (e.g. contact details) of persons currently represented on the advisory committee.

Ad Item (xi) thereof

[65] This request is, in my view, impermissibly vague and overbroad.

SUMMARY

[66] To summarise then: Biowatch has, in my view, established that it has a clear right to some of the information to which access was and is now requested; that the Registrar's failure to grant it access to such information as it was legally entitled to, constituted a continued infringement of Biowatch's rights under section 32(1)(a) of the Constitution; that Biowatch had no alternative remedy to enforce its rights[108]; that Biowatch should not be non-suited for the inept manner in which the information sought in its fourth request, as well as in its notice of motion, is formulated; and that the Registrar would be entitled to refuse access to certain records, or parts thereof, in terms of the grounds for refusal contained in Chapter 4 of Part 2 of PAIA.

THE ORDER

[67] In view of all these considerations I am of the view that an order should be granted entitling Biowatch to access certain records, subject to the proviso that access thereto could be refused on the grounds contained in Chapter 4 of Part 2 of PAIA. The order I have in mind will be formulated in such a way that this would be permitted.

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[108] Counsel for Stoneville's submission that Biowatch's alternative remedy was to engage the procedures stipulated in PAIA is hardly satisfactory, because it entails that Biowatch's requests for information would have been rendered useless and that new requests would have had to be made under PAIA. This submission indirectly calls for a retrospective application of the provisions of PAIA.

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

[69] I accordingly make the following order:

(a) The first and second respondents (as well as the third respondent to the extent that she and the National Department of Agriculture are in possession of any of the records mentioned hereunder) are ordered to provide access to the applicant – either by way of inspection or by the making of copies – to the undermentioned records as soon as practically possible, but in any event by no later than 30 April 2005, namely:

(i) .All data relating to risk assessments accompanying requests for trials and commercial releases of GMOs, including but not limited to, field trial risk assessments, commodity import-animal consumption risk assessments, and the following Conditional General Releases:

- 1996 Monsanto Bt Cotton;
- March 1997 Monsanto Bt Maize;
- September 1997 PHI Bt Maize; and
- August 1998 AgrEvo Glufosinate Resistant Oilseed Rape, Maize and Soyabean.

(ii) all applications for permits, approvals and other authorisations submitted in terms of the GMO Act and/or the regulations promulgated under it;

(iii) all permits and/or approvals and/or other authorisations granted and all applications pending in respect of imports, exports, field trials and/or general releases, including –

- the description of the GMO, the name and address of the applicant, and the purpose of the contained use or release and the location of use;

- the methods and plans for the monitoring of the genetically modified organisms and for emergency measures in the case of an accident; and

- the evaluation of foreseeable impacts, in particular any pathogenic or ecologically disruptive impacts;

(iv) all records pertaining to public participation since the commencement of the GMO Act, including, but not limited to, the State's policy in regard to public participation and copies of all advertisements, notices and comments received in terms of regulation 6 of the Regulations promulgated under the GMO Act;

(v) all records pertaining to the areas of the field trials and commercial releases;

(vi) the register of registered academic and research institutions and facilities for the years 1999 to 2001;

(vii) the Minutes of all meetings of the Executive Council of Genetically Modified Organisms and the Advisory Committee to date hereof; and

(viii) the records pertaining to all persons currently represented on the Advisory Committee, and confirmation that members of public sector have been appointed to the Committee; and

(b) the first and second respondents (as well as the third respondent to the extent that she and the National Department of Agriculture are in possession of any of the aforementioned records) are ordered to refrain from witholding the whole or any portion of the records specified in paragraph (a)(i) to (viii), above, except where this is permitted in terms of any of the specific grounds of refusal of information specified in Chapter 4 of Part 2 of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) ("*PAIA*"); and

(c) the first and second respondents (as well as the third respondent to the extent that she or the National Department of Agriculture are in possession of any of the aforementioned records) are ordered to furnish written reasons (with reference to the relevant provisions of PAIA) if they, in the circumstances contemplated in paragraph (b),above, were to refuse to give access to any record, or, as the case may be, a portion or portions of any record (either by masking or whatever other practical means) to the applicant; and

(d) the applicant is ordered to pay the fourth respondent's costs, but no other order as to costs is made; and

(e) lastly, It is noted that Pannar (Pty) Ltd has voluntarily made information available to the applicant by agreement between them, with the result that the first, second and third respondents are, to this extent, absolved from also providing any information relating to any applications made by Pannar (Pty) Ltd to the first respondent available for inspection or copying in terms of paragraph (a), above.

E W DUNN: ACTING JUDGE
HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)
23 February 2005