

**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

**CASE NUMBER:10009/22**

In the matter between: -

**THE HEALTH JUSTICE INITIATIVE**

Applicant

and

**THE MINISTER OF HEALTH**

First Respondent

**THE INFORMATION OFFICER,**

Second Respondent

**NATIONAL DEPARTMENT OF HEALTH**

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**HEADS OF ARGUMENT ON BEHALF OF THE RESPONDENTS**

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**A. INTRODUCTION**

1. This is an application by the Health Justice Initiative (“applicant”) in terms of section 78, read with section 82, of the Promotion of Access to Information Act, 2000 (Act No 2 of 2000) (“PAIA”).

2. The applicant seeks, inter alia, an order setting aside and declaring as invalid the respondent's refusal to grant access to the records requested in terms of section 11 of PAIA; and
3. An order directing the first respondent (Minister of Health) to provide the records within ten (10) days of the date of the order.<sup>1</sup>
4. The applicant seeks copies of all Covid-19 vaccine procurement contracts, and memoranda of understanding, and agreements concluded with suppliers and manufacturers, and copies of all Covid-19 vaccine negotiation meeting outcomes and/or minutes, and correspondence, including, with the parties.<sup>2</sup>
5. It must be mentioned at the outset that this is not a review of the respondents' decision not to grant the applicant access to the records sought in terms of section 11 of PAIA.

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<sup>1</sup> 001- 1 of the caselines.

<sup>2</sup> 001-1 to 2 of the caselines.

## **B. FACTUAL BACKGROUND AND CONTEXT**

6. The applicant asserts that it is a dedicated public health and law initiative, and its mandate is to address inequalities in access to healthcare through research, advocacy, and legal action.<sup>3</sup>

7. On 19 July 2021, the applicant, the HJI, submitted a request to the Department of Health in terms of PAIA for access to the following records:

*“[A] Copies of all Covid 19 vaccine procurement contracts, memoranda of understanding, and agreements including the following parties and/or duly authorized licensed representatives of:*

- (a) Janssen Pharmaceuticals (Johnson & Johnson);*
- (b) Aspen Pharmacare;*
- (c) Pfizer;*
- (d) Serum Institute of India/Cipla;*
- (e) Sinovac/CoronaVac;*
- (f) Any other vaccine manufacturer/licensee;*
- (g) The African Union Vaccine Access Task Team (AUAVATT);*
- (h) COVAX (with the Global Vaccine Alliance GAVI) /other; and*
- (i) The Solidarity Fund.*

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<sup>3</sup> 001-16 para 12 of the caselines.

*[B] Copies of all Covid 19 Vaccine negotiation meeting outcomes and/or minutes; and correspondence, including with the following parties and/or duly authorised licensed representative/s of;*

- (a) Janssen Pharmaceuticals (Johnson & Johnson);*
- (b) Aspen Pharmacare;*
- (c) Pfizer;*
- (d) Serum Institute of India/Cipla;*
- (e) Sinovac/ CoronaVac;*
- (f) Any other vaccine manufacturer/licensee;*
- (g) The African Union Vaccine Access Task Team (AUAVATT);*
- (h) COVAX (with the Global Vaccine Alliance: GAVI)/other; and*
- (i) The Solidarity Fund.<sup>4</sup>*

8. On 29 July 2021, the respondents notified the vaccine manufacturers and suppliers about the request made by the applicant to have access to the procurement agreements.

9. The applicant was informed that its request was sent to the manufacturers and suppliers to make representation on whether access should be granted or not.<sup>5</sup>

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<sup>4</sup> 001-5 to 12 of caselines.

10. On 6 August 2021, the applicant acknowledged receipt of the first respondents' letter of 29 July 2021 and reply to the request for extension of time to consider the request.<sup>6</sup>
11. On or about 15 September 2021, the applicant lodged internal appeal in terms of section 77(7) of PAIA against the respondents' lack of decision.<sup>7</sup>
12. On or about 8 December 2021, the applicant sent the same request to have access to the records to the manufacturers and suppliers.<sup>8</sup>
13. On 7 January 2022, Pfizer advised that the information requested is itself confidential and protected from disclosure and cannot be provided.<sup>9</sup>
14. On 11 January 2022, the respondents advised the applicant that as per confidential agreements, the National department of Health is not at liberty to divulge such details/information.<sup>10</sup>
15. On or about February 2022 the applicant launched this application.

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<sup>5</sup> 001-81 of the caselines.

<sup>6</sup> 001-82 to 83 of the caselines.

<sup>7</sup> 001-65 to 68 of the caselines.

<sup>8</sup> 001- 91 to 98 of the caselines.

<sup>9</sup> 001 -107 of the caselines.

<sup>10</sup> 001- 109 of the caselines.

### **C. ISSUES FOR DETERMINATION**

16. The applicant did not join the manufacturers and/or suppliers from whom the vaccines were purchased and these manufacturers and/or suppliers have a direct and substantial interest in the issues to be determine by the Court, there is non-joinder of interested parties.

16.1. The preliminary issue is whether the “third parties” should have been joined in these proceedings or not.

16.2. We appreciate the fact that this issue is raised for the first time, but we contend that it involves the law and procedure.

17. The primary issue is whether the respondent’s refusal to grant applicant access to the records is justified.

### **D. NON-JOINDER OF THE MANUFACTURERS AND/OR SUPPLIERS**

19. It is ex facie the application that the manufacturers or suppliers who are (“third parties”), have direct and substantial interest in the records sought by the applicant have not been joined as respondent in these proceedings.

20. This is so despite the applicant having full knowledge of the particulars of the “third parties.” The applicant has served the request to have access to the records on 8 December 2021.

21. Even though the applicant does not seek any order against third parties, the third parties have a direct and substantial interest in the issue before Court. Most importantly, Pfizer has advised that it cannot grant access to the record due to confidentiality of the agreement.<sup>11</sup> The applicant should have served the application on the third parties or Pfizer.
22. In *Barkhuizen v Napier* the court held that the mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it.<sup>12</sup>
23. It is submitted with respect that joinder is not a matter of convenience, but issue of law and procedure. The applicant's application is flawed for non-joinder.<sup>13</sup>
24. It is submitted with respect that the application should fail on this basis.

#### **E. THE SCHEME OF PAIA**

18. The objects of PAIA are—
- (a) to give effect to the constitutional right of access to—
- (i) any information held by the State; and

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<sup>11</sup> 001- 107 of the caselines.

<sup>12</sup> 2007 (5) SA 323 (CC) para [39].

<sup>13</sup> *Bowing NO v Vrededorp Properties CC and Another* 2007 (5) SA 341 (SCA) para [21].

- (ii) any information that is held by another person and that is required for the exercise or protection of any rights.

(b) to give effect to that right—

- I. subject to justifiable limitations, including, but not limited to, limitations aimed at the reasonable protection of privacy, commercial confidentiality, and effective, efficient, and good governance; and
- II. in a manner which balances that right with any other rights, including the rights in the Bill of Rights in Chapter 2 of the Constitution.

25. Section 11 (1) provides that, a requester must be given access to a record of a public body if —

(a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and

(b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.

26. But PAIA places limitations on the right of access to information. It does this by exempting certain information from disclosure. PAIA recognises, in



its Preamble, that there are “reasonable and justifiable” limitations on the right of access to information.

27. These limitations emerge from the exemptions to disclosure contained in Chapter 4 of the Act. The purpose of Chapter 4 is to protect from disclosure certain information that, if disclosed, could cause material harm to, amongst other things: the defence, security, and international relations of the Republic; the economic interests and financial welfare of the Republic and commercial activities of public bodies; and the formulation of policy and taking of decisions by public bodies in the exercise of powers or performance of duties conferred or imposed by law.<sup>14</sup>
28. Section 33(1) of PAIA reads that “The information officer of a public body:
- (a) must refuse a request for access to a record contemplated in section 34(1), 35(1), 36(1), 37(1)(a), 38(a), 39(1)(u), 40 or 43(1);
  - or
  - (b) may refuse a request for access to a record contemplated in section 37(1)(b), 38(b), 39(1)(b), 41(1)(a); or
  - (c) 42(1 or 3); 43(2), 44 (1 or 2); 45; unless the provisions of section 46 apply.

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<sup>14</sup> President of the Republic of South Africa v M & G Media Ltd 2012 (2) SA 50 (CC) para [11].

29. Section 36(1) of the Act, provides that “Subject to subsection 2, the information officer of a public body must refuse a request for access to a record of the body, if the record contains:

(a).....;

(b).....; or

(c) Information supplied in confidence by a third party, the disclosure of which could be expected –

i. to put that third party at a disadvantage in contractual or other negotiations; or

ii. to prejudice that third party in commercial competition.

[2] A record may not be refused in terms of subsection (1) as far as it consists of information-

(a) ready publicly available,

(b) about a third party who has consented in terms of Section 48 or otherwise in writing to its disclosure to the requester concerned;  
or

(c) about the results of any product or environmental testing or other investigation supplied by and earned out or on behalf of a third party and its disclosure will reveal a serious public safety or environmental risk.

30. Section 37(1) states: “Subject to subsection (2) the information officer of a public body –

- (a) must refuse a request for access to a record of the public body if the disclosure of the record will constitute an action for breach of duty of confidence owed to a third party in terms of an agreement; or
- (b) may refuse a request for access to a record of the body if the record consists of information that was supplied in confidence by a third party –
  - i. the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source; and
  - ii. if it is in the public interests that similar information, or information from the same source, should continue to be supplied.

## **F. PROCUREMENT OF VACCINES**

31. It is obvious that Covid-19 pandemic was unprecedented in many ways. The extraordinary speed within which the pandemic came about and affected countries around the world. The medical research was outpaced by the rapid spread of the virus which left healthcare workers and policy makers at a disadvantage.<sup>15</sup>

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<sup>15</sup> 004 – 14 para 14 of the caselines.

32. There was an unprecedented level of competition between countries around the world for the limited vaccine supplies that began to be made available. Because every country was desperate to protect its citizens, every country sought access to the available vaccines, and this led to a competition to secure vaccines among the countries and the largest and well-resourced countries were at an advantageous position.<sup>16</sup>
33. The vaccine strategy adopted by South Africa, envisaged three ways in which South Africa could obtain vaccines after they have passed phase 3 clinical trials and certified as safe for use on people. These were through the Covax Facility; by concluding purchasing agreements with individual vaccine manufacturers; and acquisition through arrangements with the African Union. Thus, South Africa's procurement of vaccines must be seen within that context. There has been a struggle for African countries in procuring vaccines from manufacturers or pharmaceutical companies.
34. After government internal processes, inter alia: application to the National Treasury for a deviation from normal procurement processes, procurement procedures were followed, and subsequent negotiations with the vaccine manufacturers and suppliers, purchase agreements were concluded.<sup>17</sup>

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<sup>16</sup> 004 – 15 para 16 of the caselines.

<sup>17</sup> 004-19 to 20 of the caselines.

35. The government's engagement with the vaccine manufacturers and suppliers is set out in the opposing affidavit.<sup>18</sup> The averments are undisputed.

#### **G. RESPONDENTS' GROUNDS FOR RESISTING ACCESS**

36. The respondents' resistance to the granting of access to the records is based on two grounds, firstly that the records contained information supplied in confidence by the third parties, the disclosure of which could reasonably be expected –

- (i) to put that third party at a disadvantage in contractual or other negotiations; or
- (ii) to prejudice that third party in commercial competition, as contemplated by section 36(1)(c) of PAIA and that the agreements contained confidentiality clause for which a disclosure would constitute an action for breach of a duty of confidence owed to the third party as contemplated by section 37(1)(a) of PAIA.<sup>19</sup>

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<sup>18</sup> 004-20 to 23 of the caselines.

<sup>19</sup> 004 – 23 to 24 of the caselines.

37. It is settled law that the onus is on the respondents to justify withholding the records on the grounds set out by PAIA. Section 36(1)(c) of PAIA has been the subject of courts interpretation and application.<sup>20</sup>
38. Section 37(1)(a) of PAIA was also the subject of court's interpretation and application<sup>21</sup> This section authorises the information officer of a public body to refuse a request for access to a record of the public body if the disclosure of the record will constitute an action for breach of duty of confidence owed to a third party in terms of an agreement.
39. ***In Independent Newspapers v Minister for Intelligence Services*** the Court held that: *"...In deciding whether documents ought to be disclosed or not, a court will have regard to all germane factors which include the nature of the proceedings; the extent and character of the material sought to be kept confidential; the connection of the information to the national security; the grounds advanced for claiming disclosure or refusing it; whether the information is already in the public domain and if so, in what circumstances it reached the public domain; for how long and to what extent it has been in the public domain; and finally, the impact of the disclosure or non-disclosure on the ultimate fairness of the proceedings*

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<sup>20</sup> President of RSA v M&G *supra*, para [23]; SA History Archive Trust v SA Reserve Bank 2020 (6) SA 127 (SCA).

<sup>21</sup> Transnet Ltd and Another v SA Metal Manufacturing Co. (Pty) Ltd 2006 (6) SA 285 (SCA) para [18].

*before a court. These factors are neither comprehensive nor dispositive of the enquiry.*"<sup>22</sup>

40. It is common cause that the purchase agreements were concluded with the specified vaccines manufacturers and suppliers.
41. The resolution of a dispute whether the agreements contained confidentiality clause can be determined with reference to agreements and the circumstances surrounding the conclusion of the agreements.
42. It is a customary practice that in commercial transactions, the parties may agree to a non-disclosure of the terms and conditions of the transaction.

#### **H. CONFIDENTIALITY CLAUSE**

43. The fact that the transacting parties agree to have a confidentiality clause to protect its future commercial interests. Therefore, this does not make the agreement suspicious.
44. In ***Coco v AN Clark (Engineers) Ltd***<sup>23</sup> "the classic duty of confidence arises in circumstances where a person entrusts confidential information to

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<sup>22</sup> 2008 (5) SA 31 (CC) para [55].

<sup>23</sup> *Coco v A N Clark (Engineers) Ltd* ChD 1968 F.S.R.415.

a confidant, typically, for his knowledge or for some limited use. We say routinely that there are three requirements for the cause of action.

- (i) the information must have the necessary quality of confidence,
- (ii) the information must be imparted in circumstances importing a duty of confidence, and
- (iii) there must be actual or threatened breach. The duty of confidence is extended to a person who obtains confidential information surreptitiously or improperly of contract.”

45. ***In Earthlife Africa v Eskom Holdings Ltd*** paragraph 72 the court said the following: *“the information and documentation requested by the applicant constitutes confidential information and trade secrets which are protected from disclosure.”*<sup>24</sup>

46. The basis of the inclusion of confidentiality clause in the agreement or contracts is to protect the interests of the parties to the agreement. The transacting parties protect their interests against unauthorised disclosure of the information given in confidence.

47. The consequences of the disclosure of a confidential information to the third party is that the third party may be compelled to negotiate from an unfavorable position.

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<sup>24</sup> (04/27514) [2005] ZAGPHC 129.



48. Furthermore, the third party could be prejudiced by the information disclosed resulting in it being compelled to accept a transaction on the terms it would ordinarily agree to. This is common occurrence.
49. Our understanding of section 36(1) (c) is that the respondent is not required to demonstrate with certainty that the information sought to be withheld would certainly disadvantage or prejudice the third party.
50. It is contended that the respondents are required to show that the information sought to be protected by section 36(1) (c) if disclosed, will probably harm the third party's future business dealings.
51. The third parties in this matter are international companies. It is conceivable that the basis of confidentiality is to protect their future business interests. If the information sought to be protected is placed in the public domain, their business interests would be at risk.
52. Whether the information sought to be protected could be expected to disadvantage or prejudice the third party can only be determined with reference to the information itself.

53. If the records are disclosed without the third parties' consent, the risk is that the disclosure would constitute a breach of confidentiality and the respondents may be visited with action for damages.
54. This risk or imminent harm was confirmed in ***Earthlife Africa v Eskom Holdings Ltd*** *supra*, the court concluded that to rely on section 37(1)(a) of PAIA there needs to be a risk that if the third party sued for a breach of confidentiality, the information holder would be at risk of an adverse finding as to material breach entitling cancellation of the agreement or as to an award of damages.
55. We interpose and maintain that South Africa is a party to global commercial practice and confidentiality clauses are part of those practices and the government, as a contracting party, is bound by those practices and agreements. The government cannot be treated differently from any other juristic person who negotiates commercial transactions.
56. *In Barkhuizen v Napier*<sup>25</sup>, *supra* paragraph 12 of the judgment, the court cautioned that the fact that a term in a contract is unfair or may operate harshly does not, by itself, lead to the conclusion that it offends the values of the Constitution and in paragraph 159F, it went further and confirmed that the power to declare contracts contrary to public policy should, however be exercised sparingly and only in the clearest of cases, lest

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<sup>25</sup> 2007 (5) SA 323.

uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the public policy merely because its terms (or some of them) offend individual sense of propriety and fairness.”

57. In paragraph 59, of *Barkhuizen supra* the court held that the first enquiry must be directed at the objective terms of the contract. If it is found that the objective terms are consistent with public policy on their face, the further question will then arise which is whether the terms are contrary to public policy in the light of the relative situation of the contracting parties.
58. The procurement agreements concluded by the respondents are not contrary to public policy as alleged by the applicant.<sup>26</sup> There is no evidence to support this proposition. The respondents have a public duty to protect the citizens of the Republic of South Africa and in the performance of its public duty, it concludes trade agreements both locally and internationally.
59. The records requested by applicant are not publicly available and parties to the agreements have not consented to the disclosure of the records. In fact, Pfizer refused to grant disclosure of the records and other parties to the agreement are deemed to have refused to grant access to the requested information. The decision to refuse access to the vaccine procurement contracts is justifiable under the circumstances.

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<sup>26</sup> Page 18 para 42.1 of the applicant's heads of argument.

60. The non-disclosure of the agreements enjoys legal protection, is lawful, and justifiable.
61. In writing for the majority in the Constitutional Court Ngcobo CJ also concluded that on the other hand, holders of information may be compelled to rely on the contents of the record itself to justify the exemption, but they will be precluded from doing so by the provisions of ss 25(3)(b) and 77(5)(b) of PAIA.<sup>27</sup>
62. The disclosure of confidential information would cause harm to the Republic of South Africa's commercial interests, in its future contractual relationships with the manufacturers, suppliers of vaccines and other countries who are signatories to the agreements and other international pharmaceutical companies.
63. The manufacturers and suppliers would be reluctant to engage with the South African government in confidence because the government may be compelled by third parties to disclose information provided to it in confidence.

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<sup>27</sup> President of the RSA v M & G Media *supra* para [35].

64. The disclosure of the records may prejudice future supply of similar information from the same source or sources. It is conceivable that the vaccine manufacturers hold exclusive licenses to manufacture the vaccines.
65. South Africa is not the only country that agreed to have confidentiality clause in the agreements with pharmaceuticals companies. According to the media reports other countries have agreed to the confidentiality clause.<sup>28</sup>
66. When dealing with coronavirus, government could not operate in a vacuum but as part of the international community and it needed to rely on the co-operation of institutions and third parties to supply relevant information to enable the departments to perform their public duties. It is similarly justifiable for the respondents to refuse access to information based on the sections mentioned above.
67. It is conceivable that the object of supplying information in confidence, is to ensure that the information is protected against unauthorised disclosure.
68. The grounds of refusal relied on by a public body must be evaluated objectively. The question is not whether the “best evidence” to justify the

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<sup>28</sup> 001 – 129 of caselines.

refusal has been provided, but whether the information provided is sufficient for a court to conclude, on the probabilities, that the record falls within the exemption claimed.<sup>29</sup>

69. If regard is had to the contents of the answering affidavit, the averment lacks factual foundation.<sup>30</sup> It is apparent that the Government concluded agreements with Pfizer; Moderna; AstraZeneca (via the Serum Institute of India); and Johnson and Johnson, respectively.
70. The procurement process, some of the terms and conditions of the agreements, inter alia: the price, quantity of vaccines and delivery schedules are available on the Department of Health's website.
71. In ***Barclays National Bank Ltd v Love***, the court, in the context of summary judgment, held that —"*[a]lthough it is not necessary for the deponent to state reasons in the affidavit for his assertion that the facts are within his own knowledge he should at least give some indication of his office or capacity which would show an opportunity to have acquired personal knowledge of the facts to which he deposes.*"<sup>31</sup>

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<sup>29</sup> President of RSA v M&G supra [27].

<sup>30</sup> 004-18 to 20 of the caselines.

<sup>31</sup> 1975 (2) SA 514 (D).

## **H. PUBLIC INTEREST CONSIDERATION**

72. PAIA's public interest override is limited to information which discloses evidence of a substantial contravention of the law or poses a serious risk to public safety or the environment or the public interest clearly outweighs the harm.<sup>32</sup>
73. We submit with respect that there is no basis to suggest that the disclosure of the agreements would reveal evidence of a substantial contravention of, or failure to comply with the law, or an imminent and serious public safety or environmental risk.
74. In ***Centre for Social Accountability v Secretary of Parliament***<sup>33</sup> it was held that the requester must show on a balance of probability that the disclosure would reveal evidence of the required contravention or failure.
75. We submit that there is no evidence that the records requested by applicant would reveal evidence of a contravention of the law or that public interest outweighs the protection of the records as contemplated by section 46 of PAIA.

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<sup>32</sup> Section 46 of PAIA.

<sup>33</sup> 2011 (5) SA 279 (ECG) at paras [92] and [94].

76. We submit with respect that it was in the public interest to procure vaccines to prevent deaths. It is tempting to conclude that the applicant is pursuing this matter hoping to find evidence of wrongdoing.

## **K. CONCLUSION**

77. We contend that the respondents have discharged the burden placed on them by section 81(3) of PAIA to show on the balance of probabilities that the information withheld falls within the exemptions contemplated by PAIA.<sup>34</sup>
78. The applicant's application falls to be dismissed with costs, and such costs should include the costs occasioned by the employment of two counsel.
79. We submit with respect that the applicant pursues this application primarily for its own interest.<sup>35</sup> The assertion that it also pursues this litigation on the public interest<sup>36</sup> is an attempt to circumvent prospects of attracting an order of costs.

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<sup>34</sup> The President of RSA v M&G *supra* para [23].

<sup>35</sup> 001-16 para 14 of the caselines.

<sup>36</sup> 001-17 para 15 of the caselines.



80. We contend that this is not a genuine public interest litigation, thus, the principle enunciated in *Biowatch judgment*<sup>37</sup> is inapplicable. Consequently, the costs must follow the results.

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<sup>37</sup> *Biowatch Trust v Registrar of Genetic Resources and Others* 2009 (6) SA 232 (CC).

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N N. January

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