

**IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA**

**CASE NUMBER:** 113/CAC/Nov11

**DATE:** 12 APRIL 2013

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In the matter between:

**THE COMPETITION COMMISSION** Applicant

and

**PIONEER HI-BRED INTERNATIONAL INC** 1<sup>st</sup> Respondent

10 **PANNAR SEED (PTY) LIMITED** 2<sup>nd</sup> Respondent

**AFRICAN CENTRE FOR BIOSAFETY** 3<sup>rd</sup> Respondent

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**J U D G M E N T**

**(Application for Leave to Appeal)**

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**DAVIS, JP:**

This is an application for leave to appeal to the Constitutional  
20 Court against a costs order made by this court in his judgment  
of 28 May 2012. The merits of this case have effectively been  
disposed of and the only issue which remains for  
determination, is whether the costs order, which was made by  
this court, should be subject to appeal to the Constitutional  
25 Court.

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For the sake of clarity, two questions now arise: (1) whether this Court has the power to grant a costs order in circumstances where the applicant, in merger proceedings, recommends a particular course of action which is overturned or confirmed by the Tribunal and is then made subject to an appeal to this Court. In such a case, the question arises as to whether this Court, assuming it overturns the determination of the Tribunal, is empowered to grant an adverse order against the applicant for costs incurred before the Tribunal; (2) whether this Court is empowered to grant a costs order adverse to the applicant in the appeal proceedings itself.

Regarding the first question, this is an issue that should be determined by the Constitutional Court. There is uncertainty insofar as this question is concerned. Whether this court is empowered, to make a costs order in circumstances where the applicant vigorously opposes an appeal which has been brought by merging parties, may prove a more problematic question. I may find it difficult to accept that this Court does not have a discretion to grant a costs order insofar as appeal proceedings are concerned.

Mr Wilson, who appeared on behalf of the applicant characterises the role of the applicant in merger cases, as an

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*amicus*. I have significant doubt as to whether this description is correct. Granted merger proceedings should take the form of an inquiry. This Court's guidance to the Tribunal notwithstanding, the procedure before the Tribunal has developed in a similar fashion to that of a trial. Take this case. In effect a 'full blown' trial took place. The applicant then vigorously opposed the appeal, fought tooth and nail to ensure that the merger should be prevented. It then sought leave to the Supreme Court of Appeal on the merits of the matter. Manifestly, it did not comport itself as an *amicus*. It acted as the opposing party. For these reasons, I find it difficult to conclude, that this Court may never have the discretion to conclude that costs follow the result of the appeal.

I mention these considerations, because of the Constitutional Court's request that the views of this Court be canvassed prior to it making a determination as to whether the Constitutional Court is prepared to accept an appeal. However, given that this court is of a mind to grant leave to appeal regarding its power to grant costs in the Tribunal proceedings, it would be sensible and practical to permit the entire issue; that is both the costs order at the Tribunal proceedings and at the appellate proceedings, to be canvassed fully by the Constitutional Court.

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For these reasons, therefore, the following order is made:

5       **The applicant is granted leave to appeal to the  
Constitutional Court, subject to the rules of that  
Court against the costs order of this Court in its  
judgment, under case number 113/CAC/Nov11,  
dated 28 May 2012. The costs of this application  
shall be costs in the appeal.**

10    I agree:

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**MAILULA, AJA**

I agree:

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**SWAIN, AJA**

It is so ordered:

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**DAVIS, JP**