



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 507/2020

In the matter between:

BAYPORT SECURITISATION LIMITED
LAW SOCIETY OF SOUTH AFRICA

FIRST APPELLANT
SECOND APPELLANT

and

UNIVERSITY OF STELLENBOSCH LAW CLINIC
SUMMIT FINANCIAL PARTNERS (PTY) LIMITED
JENINA MARY MATTHYS
SKHUMBUZO RICHARD KHUMALO
FRANS SAULUS
ALBERT ROBERT KLEINSMITH
GLADYS SEIKGOTLA JANTJIES
ESTER KORDOM
SARAH FELICITY VISSER
EDGAR ARNOLDS
PATRICK MOEMEDI TLADI
LEBOGANG VICTOR MOKATE

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT
SIXTH RESPONDENT
SEVENTH RESPONDENT
EIGHTH RESPONDENT
NINTH RESPONDENT
TENTH RESPONDENT
ELEVENTH RESPONDENT
TWELFTH RESPONDENT

Neutral citation: *Bayport Securitisation Limited and Another v University of Stellenbosch Law Clinic and Others* (Case no 507/2020) [2021] ZASCA 156 (4 November 2021)

Coram: PONNAN, MAKGOKA and GORVEN JJA and PHATSHOANE and MOLEFE AJJA

Heard: 07 September 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 9h45 on 4 November 2021.

Summary: National Credit Act 34 of 2005 – s 103(5) read with s 101(1)(g) – whether collection costs as defined includes all legal costs incurred in enforcing credit agreement – whether s 103(5) applies for as long as the consumer remains in default irrespective of whether judgment has been granted – collection costs, as defined and referred to in s 101(1)(g) – to be given its common law meaning by drawing a distinction between the collection fees charged by an attorney prior to litigation and the costs awarded in an action to recover the debt – legal costs commence with a summons and do not as a general rule allow for pre-litigation costs to be recovered from the losing litigant – the judgment entered is for the capital sum fixed at a particular date together with interest – thus s 103(5) does not apply post-judgment – appeal upheld.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Hack AJ, sitting as the court of first instance):

- 1 The appeal of the first and second appellants is upheld.
- 2 The order of the high court is set aside and in its place is substituted the following:
‘The application is dismissed.’

JUDGMENT

Phatshoane AJA (Ponnan, Makgoka and Gorven JJA and Molefe AJA concurring):

[1] This appeal concerns the construction to be placed on ‘collection costs’ as defined in s 1 and whether collection costs in s 101(1)(g), as read with s 103(5), of the National Credit Act 34 of 2005 (the NCA) includes all legal costs pre- and post- judgment.

[2] The NCA introduced profound changes to the South African credit landscape. It ushered in a host of new forms of protection for consumers. These include the regulation of the consumer credit industry, prohibiting credit providers from extending ‘reckless credit’ and mechanisms to assist over-indebted consumers to manage their debt burden.¹ While the introduced reforms are mostly laudable, the inept and inelegant drafting has, on occasion, been a cause for concern.²

¹ *Sebola v Standard Bank of South Africa Ltd* [2012] ZACC 11; 2012 (5) SA 142 (CC) para 41.

² *Du Bruyn No and Others v Karsten* [2018] ZASCA 143; 2019 (1) SA 403 (SCA) para 1; *Nedbank Ltd and Others v National Credit Regulator and Another* [2011] ZASCA 35; 2011 (3) SA 581 (SCA) para 2.

[3] In *Nkata v FirstRand Bank Ltd*,³ Moseneke DCJ remarked that the NCA infuses constitutional considerations into the culture of borrowing and lending between consumers and credit providers. He observed:

‘Credit givers serve a beneficial and indispensable role in advancing the economy and sometimes social good. They too have not only rights but also responsibilities. They must act within the constraints of the statutory arrangements. That is particularly so when a credit consumer honestly runs into financial distress that precipitates repayment defaults. The resolution of the resultant dispute must bear the hallmarks of equity, good faith, reasonableness and equality. No doubt, credit givers ought to be astute to recognise the imbalance in negotiating power between themselves and consumers. They ought to realise that at play in the dispute is not only the profit motive, but also the civilised values of our Constitution.’⁴

While the object of the NCA is largely to protect consumers, the interests of creditors must also be safeguarded and should not be overlooked.⁵

[4] The appeal by Bayport Securitization RF Limited (Bayport), a company providing credit (small and intermediate) to consumers, and the Law Society of South Africa (LSSA), the first and second appellants respectively, against a judgment of the Western Cape Division of the High Court (per Hack AJ), is with the leave of that court. The University of Stellenbosch Law Clinic (the Law Clinic) and Summit Financial Partners (Pty) Ltd (Summit), the first and the second respondents, represented the third to twelfth respondents in application proceedings before Hack AJ. The application cited 47 respondents, which included Bayport and LSSA.

[5] The respondents sought and were granted the following three declaratory orders and certain consequential relief:

‘(a) That collection costs as referred to in section 101(1)(g), as defined in section 1 and contemplated in section 103(5) of the National Credit Act 34 of 2005, includes all legal fees incurred by the credit provider in order to enforce the monetary obligation of the consumer under a credit agreement charged before, during and after litigation.

³ *Nkata v FirstRand Bank Ltd* [2016] ZACC 12; 2016 (4) SA 257 (CC).

⁴ *Ibid* para 94.

⁵ *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC) para 40.

(b) That section 103(5) of the National Credit Act 34 of 2005 applies for as long as the consumer remains in default of his/her credit obligations, from the date of default to the date of collection of the final payment owing, in order to purge his default, irrespective of whether judgment in respect of the default has been granted or not during this period.

(c) That legal fees, including fees of attorneys and advocates, in as much as they comprise part of collection costs as contemplated in section 101(1)(g) of the National Credit Act 34 of 2005 may not be claimed from a consumer or recovered by a credit provider pursuant to a judgment to enforce the consumer's monetary obligations under a credit agreement, unless they are agreed to by the consumer or they have been taxed.'

Paragraphs (d) to (f) of Hack AJ's order deal with the consequential relief for the appointment of an expert to recalculate the outstanding amounts of certain emoluments attachment orders (EAO) obtained against the third to twelfth respondents and for the repayment of any amount found to have been due and owing pursuant to the recalculation.

[6] The appeal by the LSSA is against the whole of the judgment and order of the high court, whereas Bayport's appeal is directed solely against the declaratory relief granted in para (b) on the basis, in essence, that if that paragraph of the order does not withstand scrutiny, then the rest of the relief granted likewise cannot stand.

[7] Central to the declaratory orders granted by the high court is the definition of collection costs. According to s 1 of the NCA, 'collection costs' means:

'[A]n amount that may be charged by a credit provider in respect of enforcement of a consumer's monetary obligations under a credit agreement, but does not include a default administration charge'.

The NCA limits the extent to which a consumer may be held liable to a credit provider under a credit agreement. In terms of s 101(1) of the NCA, a credit agreement may not require payment by the consumer of any money or other consideration, except: the

principal debt (subsec (a));⁶ an initiation fee (subsec (b));⁷ a service fee (subsec (c));⁸ interest (subsec (d));⁹ cost of any credit insurance (subsec (e));¹⁰ default administration charges (subsec (f));¹¹ and collection costs (subsec (g)).¹²

[8] The NCA prescribes in s 103(5) that the aggregate interest, fees and charges, including collection costs referred to in s 101(1)(a) to (g), which accrue during the time that the consumer is in default, may not exceed the unpaid balance of the principal debt at the time of the default. It provides:

‘Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 101(b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs.’

[9] The high court favoured an interpretation that in terms of s 101(1)(g) collection costs included all legal fees incurred by the credit provider to enforce the monetary obligations of the consumer. Those included the costs incurred: (a) prior to the commencement of litigation; (b) post the commencement of litigation, but pre-judgment

⁶ Section 101(1)(a) reads: ‘the principal debt, being the amount deferred in terms of the agreement, plus the value of any item contemplated in section 102’.

⁷ Section 101(1)(b) reads: ‘an initiation fee, which –

(i) may not exceed the prescribed amount relative to the principal debt; and

(ii) must not be applied unless the application results in the establishment of a credit agreement with that consumer’.

⁸ Section 101(1)(c) reads: ‘a service fee, which-

(i) in the case of a credit facility, may be payable monthly, annually, on a per transaction basis or on a combination of periodic and transaction basis; or

(ii) in any other case, may be payable monthly or annually; and

(iii) must not exceed the prescribed amount relative to the principal debt’.

⁹ Section 101(1)(d) reads: ‘interest, which –

(i) must be expressed in percentage terms as an annual rate calculated in the prescribed manner; and (ii) must not exceed the applicable maximum prescribed rate determined in terms of section 105.’

¹⁰ Section 101(1)(e) reads: ‘cost of any credit insurance provided in accordance with section 106’.

¹¹ Section 101(1)(f) reads: ‘default administration charges, which-

(i) may not exceed the prescribed maximum for the category of credit agreement concerned; and

(ii) may be imposed only if the consumer has defaulted on a payment obligation under the credit agreement, and only to the extent permitted by Part C of Chapter 6; ...’.

¹² Section 101(1)(g) reads: ‘collection costs, which may not exceed the prescribed maximum for the category of credit agreement concerned and may be imposed only to the extent permitted by Part C of Chapter 6’.

and (c) post-judgment. It was thus construed to include all legal fees incurred through the employment of attorneys and advocates, as well as the execution of the judgment.

[10] Counsel for the respondent contended that particularly in the context of microloans s 103(5) was important, as it serves to protect the consumer from collection costs far exceeding the amount that was initially borrowed. He argued that by necessary implication legal fees had to be included in the definition of collection costs. The credit agreements, he argued, invariably make provision for costs on an attorney and client scale. In each instance, where these costs are to be recovered from consumers, the credit providers are seeking an enforcement of the credit agreement. In this regard, counsel placed reliance on *Nkata*, where reference was made to 'reasonable legal costs of enforcing the agreement'. Accordingly, so it was contended, *Nkata* is dispositive of the appellants' contentions.

[11] For a proper understanding of the context in which reference was made to 'reasonable legal costs of enforcing the agreement' in *Nkata*, an analysis of that case is necessary. In the main, *Nkata* concerned the correct interpretation of subsecs 129(3)(a) and 129(4)(b) of the NCA. At any time before a credit provider has cancelled the credit agreement, s 129(3) of the NCA permits consumers who have fallen into arrears, and face impending debt-enforcement procedures, to remedy their default or 'reinstate' the credit agreement by paying the full arrear amounts, along with the credit provider's permitted default charges and reasonable costs of enforcing the agreement. Section 129(4)(b) precludes reinstatement 'after . . . the execution of any other court order enforcing that agreement'.

[12] Ms *Nkata*, a consumer, who was in default of a mortgage loan agreement, paid all overdue instalments but did not make separate payment of the 'costs of enforcing the agreement' which the credit provider, FirstRand Bank Ltd (the bank), had debited to her account. She made this payment when the bank had already taken judgment against her and had obtained a writ of execution against the mortgaged property, but before (as a

result of further arrears) the bank attached and had the mortgaged property sold in execution.

[13] The minority decision took the view that the credit agreement between Ms Nkata and the bank was not reinstated in terms of s 129(3) because, whilst it was so that she paid all amounts that were overdue, she did not pay the reasonable costs of enforcing the agreement. By adding the costs to the capital debt, the bank had lent Ms Nkata money, thereby prescribing the manner in which it expected to receive payment. But the bank's action in postponing its claim for payment did not mean that she had paid those costs. The majority held that properly construed s 129(3) did not preclude the reinstatement of a credit agreement where the consumer had paid all the amounts that were overdue, but had not been given due notice of reasonable legal costs — whether agreed or taxed. This was so because the legal costs would become due and payable only when they are reasonable, agreed or taxed and on due notice to the consumer. The majority found that the credit agreement was reinstated when Ms Nkata discharged in full her bond arrears. The bank's legal costs were then not due and payable because the bank had not given her notice of the legal costs, neither had it demanded its payment properly or at all. Also, the nature and extent of the legal costs had not been agreed to by Ms Nkata and had not been assessed for reasonableness by taxation or other acceptable means. Instead, the bank chose to be the sole arbiter of the extent of the legal costs and unilaterally debited the costs to the bond account of Ms Nkata.

[14] *Nkata* is thus not authority for the proposition that collection costs referred to in s 101(1)(g), read with s 103(5), include legal costs. The Constitutional Court was not required to consider the distinction between collection costs and litigation costs or to consider whether the litigation costs form part of collection costs referred to in s 103(5). The costs at issue in *Nkata* were costs incurred to enforce the credit agreement through the institution of legal proceedings (these were costs of the cancelled sale in execution, as well as the costs of the rescission application 'as taxed or agreed', which Ms Nkata had agreed to service).¹³ The Constitutional Court had no difficulty in concluding that such

¹³ In para 10 of *Nkata* the Court noted that '... The bank describes these as being for the attorney's fees

costs could be claimed from the consumer provided they were taxed or agreed between the parties in the normal course.

[15] Our courts have over many years drawn a distinction between collection costs and litigation costs. The high court reasoned that those authorities predate the Constitution and are thus not relevant. It is trite that a statutory provision should not be interpreted so as to alter the common law more than is necessary, unless the intention to do so is clearly reflected in the enactment, whether expressly or by necessary implication. It is a sound rule to construe a statute in conformity with the common law, save where and insofar as the statute itself evidences a plain intention on the part of the Legislature to alter the common-law.¹⁴ As long ago as 1916 in *D & D H Fraser Ltd v Waller*,¹⁵ Innes CJ had occasion to state:

'But the point is that the costs recoverable must be costs of collection. Collection in the sense in which the word is used.... is a different process from recovery by action. The assistance of the Court is invoked after the collector has failed. The attorney who conducts the case recovers the money at law, and is remunerated by the costs awarded him. He cannot claim against his principal a commission upon the amount of the judgment; nor can the agent; for neither of them has collected the debt. And it would make no difference should the capacities of collecting agent and attorney happen to be united in the same individual. If it were otherwise, there would be a double charge - costs plus commission - upon the debtor in every case in which an instrument of debt containing a collection clause was sued upon.'¹⁶

[16] Nothing in the NCA suggests an intention on the part of the Legislature to depart from that construction. It follows that collection costs, as defined and referred to in s 101(1)(g), should be given the same meaning as in *D & D H Fraser*. That a distinction is to be drawn between collection costs and legal fees is fortified by the fact that in terms of

and counsel's day fee in Ms Nkata's unsuccessful rescission application, which costs were covered by the parties' settlement agreement. This was in addition to a globular amount of R9050, debited to the mortgage bond account in October 2010, for fees that the bank had incurred in pursuing the cancelled execution and sale'. The R9 050 was for summons, judgment, writ, attachment and first sale in execution, including VAT, disbursements and sheriff's fees.

¹⁴ Footnote 2 para 38.

¹⁵ *D & D H Fraser Ltd v Waller* 1916 AD 494.

¹⁶ *Ibid* at 501.

the Superior Courts Act 10 of 2013, the Magistrates' Courts Act 32 of 1944 (MCA), or the Debt Collectors Act 114 of 1998 (whichever is applicable to the enforcement of the credit agreement) maximum tariffs are prescribed.¹⁷

[17] Costs are awarded to successful litigants in order to indemnify them for the expense to which they have been put through, having been compelled either to initiate or defend litigation. The ensuing legal costs, which courts have a discretion to both award and determine the applicable scale thereof, flow directly from, and are limited to, the litigation. Owing to the necessary operation of taxation, such an award is seldom a complete indemnity. However, that does not affect the principle on which it is based.¹⁸ The high court failed to take into account that in terms of the tariff applied by taxing masters, legal costs are regarded as commencing with a summons and do not as a general rule allow for pre-litigation costs to be recovered from the losing litigant.¹⁹

[18] The respondents' submission that the NCA puts a maximum limit on the amount of legal costs that can be recovered from a consumer would lead to some glaring absurdities. What militates against such a construction is that the award of costs generally involves the exercise of a judicial discretion. To hold that collection costs include legal costs would be to oust or severely fetter the discretion of a court to make appropriate costs orders, including where necessary punitive costs orders. The following example, which was put to counsel and to which he had no answer, may well illustrate the point: Assuming that credit provider A, is forced to institute proceedings in a magistrates' court against consumer B. Judgment is entered for A. B then prosecutes an appeal to the high

¹⁷ In terms of s 51 of the Superior Courts Act 10 of 2013 the rules applicable to the various high courts immediately before the commencement of that section remain in force to the extent that they are not inconsistent with the Act. Rule 22 of the Rules of the Constitutional Court as published in Government Notice R1675 in *Government Gazette* 25643 of 31 October 2003 provides for taxation of costs and attorneys' fees; Rules 17 and 18 of Rules Regulating the Conduct of the Proceedings of the SCA as promulgated in Government Notice R1523 of 27 November 1998 provides for taxation of costs and attorneys' fees. Rule 69 of the Uniform Rules of the high court provides tariff of maximum fees for advocates on party and party basis in certain civil matters and rule 70 applies to taxation and tariff of fees of attorneys. See also s 80 of the MCA read with rule 33 of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts published under GN R740 in GG 33487 of 23 August 2010 and regulations made in terms of the National Credit Act, 2005 as published under GNR. 489 of 31 May 2006.

¹⁸ *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488.

¹⁹ Footnote 15 at 501 and 505.

court, which fails. Are the costs of the appeal also to be limited by the application of s 103(5)? What if a further appeal is prosecuted by B to this Court? Imagine if any of the courts form the view that B's conduct in the litigation is deserving of censure, would it be precluded by virtue of s 103(5) from ordering costs on a punitive scale? Where, for example, the principal debt is comparatively small (as most micro loans are), it is not hard to imagine that the litigation costs will quickly exceed that amount.

[19] Had the Legislature intended collection costs to include legal costs, it could easily have said as much. The language used by the legislature demonstrates that collection costs were not intended to include litigation costs. 'If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination'.²⁰

[20] It was argued for the respondents that the debt collection procedures for small loans have no transparent billing system in that credit providers or their collecting agents are at large to simply add untaxed costs to the outstanding capital sum with no consideration as to whether the services were provided and the fees reasonable. In *Nkata*, in the context of s 129(3), it was said that 'if a credit provider is not obliged properly to quantify and give due notice of the legal costs to the consumer, the relief s 129(3) affords to a consumer will be frustrated and become illusory'.²¹ At para 148, Nugent AJ, in the minority decision, remarked that perhaps greater transparency in the bank billing system was desirable 'but that is then a matter for the Legislature to correct.'

[21] The stamps, fees, costs and charges in connection with any civil proceedings in the magistrates' courts shall, as between party and party, be payable in accordance with the scales prescribed by the rules.²² In terms of s 80(3) of the MCA, payment of costs awarded by the court (otherwise than by a judgment in default of the defendant's appearance to defend or on the defendant's consent to judgment before the time for such

²⁰ *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC) para 18.

²¹ Footnote 3 para 125.

²² Section 80(1) of the Magistrates' Courts Act 32 of 1944 (MCA).

appearance has expired) may not be enforced until the costs have been taxed by the clerk of the court.²³ Except as specifically set out in or necessarily implied by the NCA, its provisions are not to be construed as limiting, amending, repealing or otherwise altering any provision of any other Act.²⁴ Section 80(3) of the MCA has not been amended by the NCA. As I see it, the allegation that excessive costs are being charged in the context of EAOs, may be a matter for the Legislature. Assuming it to be true, it cannot be addressed by a strained interpretation of s 103(5).

[22] The conclusion that collection costs do not include legal costs may well be dispositive of the appeal in its entirety. However, in view of the fact that the appeal of Bayport was confined to para (b) of the high court's order, it may be necessary to turn to the contentions advanced in that regard. That order is to the effect that s 103(5) of the NCA applies for as long as the consumer remains in default of his or her credit obligations, from the date of default to the date of collection of the final payment, irrespective of whether judgment has been granted.

[23] The appellants argued that a judgment alters the character of the debt. By the grant of judgment, the litigation steps taken to obtain satisfaction of a judgment, cannot be equated with the collection of the debt in its original form. It must follow, they contend, that s 103(5) ceases to be of any force or effect post-judgment because it can only apply while the creditor is in default under the credit agreement. The respondents, on the other hand, contend that the judgment does not novate the credit agreement but strengthens and reinforces the original debt. Thus, the statutory limit in s 103(5) remains in force even after judgment.

[24] That a judgment provides judgment creditors with a new cause of action on which they may sue in another court has been settled by this Court in *MV Ivory Tirupati*.²⁵ The

²³ *Ibid* section 80(1)(3).

²⁴ Section 2(7) of the NCA.

²⁵ *MV Ivory Tirupati: MV Ivory Tirupati v Badan Urusan Logistik (aka Bulog)* [2002] ZASCA 155; 2003 (3) SA 104 (SCA) para 31.

views expressed in *Eke v Parsons*,²⁶ which concerned a settlement agreement that had been made an order of court, are instructive. It was there stated:

'The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the lis between the parties; the lis becomes *res judicata* (literally, 'a matter judged'). It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order. . . .'²⁷

[25] The high court concluded that the judgment of this Court in *Nedbank*²⁸ supported its conclusion that s 103(5) of the NCA endures post judgment. *Nedbank* held:

'[38] . . . Section 103(5) is not a code and embodies no more than a specific rule applicable to specific circumstances, that is, to credit agreements subject to the NCA. It is thus a statutory provision with limited operation. It seeks not only to amend the common-law *in duplum* rule but also to extend it. It deals with the same subject matter as the common law rule but this does not mean that it incorporates all or any of the aspects of the common law rule. It is a self-standing provision and must be construed as such.'²⁹

...

'[49] ...Once the amounts referred to in s 101(1)(b)-(g) *that accrue during the period of default*, whether or not they are paid, equal in aggregate the unpaid balance of the principal debt at the time the default occurs, no further charges may be levied. It is not that a moratorium against payment is introduced by s 103(5): no amount in respect of the fees, costs and charges may 'accrue' any further. Put differently, no enforceable right to the charges outlined in s 101(1)(b)-(g) thereafter arises. This, it seems, is the meaning of the word used in cases on the common-law rule. The words of s 103(5) simply do not allow for a different construction. . . .'³⁰ (My emphasis.)

[26] However, in *Nedbank*, the court was not called upon to consider whether the statutory limit in s 103(5) continued to apply to the costs of credit referred to in s 101(1)(b)-

²⁶ *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC).

²⁷ *Ibid* para 31.

²⁸ Footnote 2.

²⁹ *Ibid* para 38. Cited footnotes excluded.

³⁰ *Ibid* para 49.

(g) after judgment had been granted. A fundamental difference between the facts in that case and in this is that after a judgment has been granted against a consumer usually, save for necessary disbursements and charges allowed in terms of the relevant tariff, only interest accrues on the judgment debt. The remaining charges contemplated in s 101(1)(b) to (g) are thus not post-judgment charges. The judgment entered is thus for the capital sum fixed at a particular date together with interest. It follows that even had it been correctly found that s 103(5) found application, it did not apply post-judgment.

[27] In conclusion, the high court's interpretation of collection costs in s 1, and its application to ss 101(1)(g) and 103(5) of the NCA, which culminated in the declaratory orders granted, cannot be supported. As the consequential relief is contingent upon the declaratory granted, it too must suffer the same fate. Accordingly, the appeal must be upheld.

[28] On the question of costs, the opposition to this appeal was made to advance the interests of vulnerable South Africans on issues of considerable moment and for the public good. The Law Clinic and the Summit took up the responsibility to represent the interests of impecunious members of society. They ought not to be mulcted in costs. The qualified immunity under *Biowatch*³¹ accordingly applies. There will thus be no costs order in this Court and in the proceedings before the high court.

[29] In the result the following order is made:

- 1 The appeal of the first and second appellants is upheld.
- 2 The order of the high court is set aside and in its place is substituted the following:
'The application is dismissed.'

M V PHATSHOANE
ACTING JUDGE OF APPEAL

³¹ *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC) paras 23-24.

Appearances:

For first appellant: ARG Mundell SC (with CL Robertson)
Instructed by: Marie-Lou Bester Inc, Johannesburg
Bokwa Attorneys, Bloemfontein.

For the second appellant: MA Badenhorst SC
Instructed by: Rooth & Wessels Inc, Pretoria
Pieter Skein Attorneys, Bloemfontein.

For the first to the twelfth respondents: I Jamie SC (with HN De Wet and DM Lubbe)
Instructed by: Suné van der Merwe Attorneys, Paarl
Webbers Attorneys, Bloemfontein.